Prison Legal News

Working to Extend Democracy to All

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Free Speech For Whom?

By Mumia Abu Jamal

[*EDITOR'S NOTE: In the Dec., 1992 issue of PLN we reported that supporters of Mumia Abu Jamal, the former Black Panther on death row in Pennsylvania accused of killing a cop, had shouted down Penn. Governor Casey at a forum in New York City. The forum had been sponsored by the Village Voice and other liberals and was about "Pro-Life Liberals", i.e. Democrats against abortion. One of the speakers was Gov. Casey who is strongly opposed to abortion rights for women and also strongly in favor of the death penalty. After being unable to speak at the forum several of the organizers, including Voice columnist Nat Hentoff, published long articles calling Mumia's supporters and the abortion rights protesters who shouted Casey down as "fascists", "brownshirts", "book burners", etc. Hentoff also claimed that Mumia was "saddened" by his supporters actions, etc.*

After reading this I started to write a letter to the editor of the Village Voice to point out the absurdity of calling anti-death penalty and abortion rights protesters "censors" and "fascists." I was going to go into the whole thing about power relationships, media access, etc. It then occurred to me that it would be best to contact the person most directly affected by this. The person whose life is at stake. Here are Mumia's comments for you to read. To the best of my knowledge none of the mainstream media that have been going on an on about Casey being shouted down have bothered to contact Mumia for his opinion on the matter. Paul Wright.]

I have nothing but admiration for those who braved the state's sanctions and the state's organs - the media - to speak out on my behalf.

Although I had no idea a protest would occur at Cooper Union, that it did hardly "saddened" me. Shocked? Surprised? Yes. Yes.

But even more "shocking" was the report that the Governor of Pennsylvania had "no knowledge" and "knew nothing" about my case; this after over 40,000 signatures of petitions were sent to him; letters from members of the Congress of the United States written to him on my behalf, people from France, Germany, the Netherlands, Japan, Jamaica, the U.K. and the U.S. - *thousands* have written, even representatives of the European parliament and "nothing?" How could one not be shocked?

And although it would be safe to say I was initially "saddened" at a valuable lost opportunity, that was before I learned of the "I don't know nothing" comment. Which, I am told, actually sparked much of the protest, as folks reacted in disbelief and outrage.

As an old avant-garde jazz aficionado, I have read Hentoff's writings on the music with admiration, but his riffs on the Cooper Union protests have troubled me. Fascists? Brownshirts? Book burners? One wonders if Nat knows the recent history of my supporters, who, just a year ago, were threatened by Philadelphia cops with death via an "electric sofa?" This coming from the baby killers and mad bombers of Osage Avenue (authors of the so-called MOVE bombing of May 13th, 1985) was a threat none of my supporters took idly.

It is one thing to burn books (and I am not unaware of the reverence with which observant Jews hold books); it is quite another thing to burn babies. I have yet to read any liberal columnist who called Philadelphia's death squad the "fascists" that they are. Still.

The Commonwealth of Pennsylvania has a special regard for books - and a special regard, quite low I might add, for the first amendment.

Books are banned to me, by prison officials, based solely upon my principled refusal to violate my religion, The Teaching of John Africa, by cutting my hair. Educational courses and books by which to study them, are specifically denied to me, solely because I refuse to violate my religion by cutting my hair.

Visits from my loved ones, family and friends, are specifically denied and lessened drastically, solely because of my religious refusal to abide by a prison rule to cut my hair.

Phone calls are non-existent, solely because I refuse to violate my faith and cut my hair as the prison seeks. But some MOVE folks suffer more.

Ramona Africa, survivor of the May 13th holocaust of Osage Avenue, served every day of her seven years, solely because she refused to violate her faith and renounce MOVE.

Sue Africa "maxed out" after almost 12 years for the same reason.

To this day, Carlos and Consuella Africa, remain in Pennsylvania hell holes, solely, *only*, because they will not violate their faith by pledging to disavow their MOVE family.

Both could have been freed on parole years ago, over 5 years ago, if they had agreed to a commonwealth stipulation that they not associate with MOVE people (their family), visit MOVE houses (their home!) nor attend any court proceeding involving MOVE people.

Nat, nor any of his colleagues, have *ever* termed any of these conditions "fascistic." Never have they condemned the government of Pennsylvania, nor the prison officials, parole officers, nor the governor, for these acts which spit on the so-called "First Amendment Guarantees" that the liberal intelligentsia find so "holy" when "desecrated" by the Cooper Union protesters.

When courts allowed the state to wave my membership in the Black Panther Party (over 10 years past) before a mostly white jury like a red flag, as a reason to execute me, no columnist crowed about the desecration of the first (nor any other) amendment. Not even when a white Aryan Brother, convicted of killing a white person following a prison escape,

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had his death sentence reversed, based solely on the introduction of his Aryan Brotherhood beliefs and associations.

Fascists? Brownshirts? Book burners? If Nat and the New York press see "fascism" in the face of handful of brave souls who dared shout down the chief executive of a government that bans books, shackles prisoners, and deprives people of their very freedom solely because of their religion; that signed the most death warrants in recent history; that sanctions religious practice with perverse isolation, then I fear for the faculty they call "vision". It's a case of "freedom of speech (religion, association, etc.) for me, but not for thee."

Lay Advisor Can't Be Adverse Witness

On May 18, 1987, an inmate at the Arizona State Prison at Tucson was found stabbed to death. An investigation ensued, and Ruben Melendez was ultimately indicted for the killing. While the investigation was still in progress, DOC personnel formally notified Melendez that he was accused of a DOC administrative violation for intentionally causing the victim's death and that he was to face a hearing before the prison disciplinary committee.

Under DOC regulations, inmates accused of major violations, including homicide, are entitled to representation by, *inter alia*, a fellow inmate. An inmate was appointed to act as Melendez's lay advisor at the hearing, and Melendez consulted with him but was transferred before the disciplinary hearing actually took place.

As the prosecution prepared for Melendez's ensuing criminal trial, the lay advisor "came forward and agreed to give evidence against Melendez based on his conversations with him." Melendez moved to preclude the advisor from testifying at trial regarding information received from him in the course of representing him in the prison disciplinary proceeding, citing the attorney-client privilege and various constitutional principles. The trial court ordered the evidence suppressed. The state appealed and the Arizona Court of Appeals reversed, holding that "a lay representative, even though authorized, is not an attorney under our privileged communications statutes." Melendez then appealed to the state supreme court, which granted review.

The question presented was whether the communication between this DOC inmate and his lay legal representative are privileged by the due process clause of the Arizona Constitution. The court ruled that it was. The court said "that it would be fundamentally unfair under Arizona's due process clause for the state to allow the Defendant to obtain the services of an inmate representative for prison disciplinary proceedings and then, without warning to the Defendant, offer the testimony of that inmate representative regarding confidential communications or information acquired in the course of prison representation." The decision of the appeals court was reversed. See, *State v. Melendez*, 34 P.2d 154 (Ariz. 1992).

A Nation in Chains

"Presidents Reagan and Bush have ensured that the federal courts will not be representative. Instead, they are a bastion of White America. They stand as a symbol of White Power." Can you guess who said these words?

I'll wager most folks missed the identity of the speaker. Stephen Reinhardt, Justice of the 9th Circuit US Court of Appeals, made those remarks during commencement for law school graduates at Golden Gate University, San Francisco, California, Spring 1992.

Reinhardt told the throng of potential attorneys, "What the African-American community perceived from the Supreme Court's decisions was that the federal judiciary is no longer interested in protecting the rights of minorities, that federal judges are far more concerned with...protecting the interests of white males."

Reinhardt pointed to the recent *McClesky* decision, where the US Supreme Court rejected overwhelming evidence of racial disparity in death sentences, the dismissal of a civil suit filed by a Black man injured by the infamous Los Angeles police choke hold, and a host of rulings narrowing civil and voting rights laws, to support his argument.

And that ain't all.

Across the US, an astonishing number of people in the "land of the free" are caged up in pens.

In fact, the US now imprisons over a million people, with over 4 million under "correctional control."

The number of Blacks, especially Black males, is striking. In numbers per 100,000, over 3,109 persons were locked up in the US; in South Africa, the number of 729 Black males per 100,000 population, meaning the Pretoria regime imprisons less that one-quarter of what the US does to its Black male population.

Look at it this way: The number of people imprisoned in the US is more than the number of people who live in 13 states; the number of people in US jails and prisons would constitute the 11th largest city in the nation; and the number of all people under "correctional control" (meaning prison, jail, probation or parole) is one and a half times greater than the population of Chicago or Nicaragua.

While Judge Reinhardt speaks solely of the federal system, surely the same or worse can be said of state court systems, where politics is more overt as an influence on who goes to jail and who doesn't.

This system of encagement is accompanied by a severe and reactionary reign of constitutional and statutory repression, from America's highest court, the Supreme Court, to the local justice of the peace.

The Fourth Amendment, said to "guarantee" freedom from search and seizures, has been scuttled by the state.

The First Amendment is an afterthought violated daily by the state, where dissidents are imprisoned for refusing to renounce their faith (as in MOVE) and Indian sacred lands are violated for the All-American god of business.

As evidenced by the recent instances of martial law in San Francisco and Los Angeles, not to mention the mass deportation of Spanish-speaking Americans back to Mexico, without notice or hearing, the Constitution is possessed of all the power and relevance of toilet paper.

This is America 1992 - the largest, Blackest prison population on earth; a judiciary of white, male, biased millionaires; a land smoldering in racial, class, sexual, ecological conflict; a nation in chains.

From: *Breakthrough*

Must Inmate Detail Witness Testimony As Condition to Having Witness Called?

"We are also of the opinion that the inmate facing disciplinary proceedings should be allowed to call witnesses...when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals." This principle was stated by the Supreme Court in its landmark disciplinary hearings case, *Wolff v. McDonnell*, 418 U.S. 539 (1974).

There is a catch to even this limited right which is creeping into the caselaw: failure of the inmate to clearly advise the hearing officer of the substance of the testimony the requested witness would give may justify the hearing officer refusing to allow the witness to testify, without the need to provide any further justification for the refusal.

The most recent court to reach this conclusion is the Second Circuit, *Scott v. Kelly*, 962 F.2d 145 (2d Cir., 1992). In *Scott*, a 2-1 decision, the inmate refused to testify at his hearing, but asked the hearing officer to call two named inmates as witnesses. The hearing officer refused, indicating that "there's no point in my calling (the) witnesses if I do not have questions to ask them (on) Scott's behalf."

The majority reasoned that since the inmate hadn't told the hearing officer about the testimony of the two witnesses, the hearing officer "had no reason to believe that the testimony would be relevant or that it would affect his decision." This would appear to put the burden on the inmate to show the relevance of a desired witness, instead of the institution having the burden to demonstrate the witness had no relevant testimony or that some other ground existed for refusing to allow the witness to testify. Technically, the court did not intend to shift the burden, but was saying only that the inmate must come forward with enough information about a proposed witness to allow the hearing officer to make an intelligent decision about whether grounds exist to deny the witness. The ultimate burden rests with the institution to justify denial of a witness.

It is not clear whether the court's ruling is a general one saying "the institution is under no obligation to call a witness requested by the inmate until and unless the inmate provides enough detail of the desired testimony to allow the hearing officer to decide if grounds exist to deny the witness" or whether *Scott* is tied to the specific facts of the case.

In a 1989 case, the Ninth Circuit left similar doubts, *Bostic v. Carlson*, 884 F.2d 1276 (9th Cir., 1989). In *Bostic*, a witness was denied because the hearing committee decided he would be unnecessarily repetitive of two other witnesses. In upholding the denial, the court of appeals said "the inmate, however, must inform the committee of the nature of the testimony each witness will deliver in order to allow the committee to determine whether institution concerns will preclude calling the witness." As with *Scott*, this apparent general statement of principle comes in a case which could be limited to its facts.

An inmate's failure to submit written questions he wanted to ask correctional officer witnesses justified a refusal to call the witnesses in *Ramer v. Kerby*, 936 F.2d 1102 (10th Cir., 1991). The institution's lack of knowledge as to the nature of the questions prevented it from exercising discretion as to whether any problem might arise around the officer's testimony.

COMMENTS: The holdings in these three cases each could be limited to the facts of each case. But in each, the statements made by the court regarding the inmate's need to disclose the nature of desired testimony are made in a general way, suggesting a general rule. It appears these cases would provide the basis for an institutional rule which required the inmate to provide the hearing officer a detailed summary of the testimony of a desired witness as a condition for that witness being called.

Generalized Written Statement of Hearing Committee Accepted, Where Evidence Clear

A disciplinary hearing committee's written decision saying it based its finding of guilt on "written reports and testimonies presented at the hearing" was constitutionally acceptable where that information could be interpreted only as either showing the charges (of verbal harassment) were true (the written report) or false (the inmate's testimony). Where there could be no ambiguity about the evidence the committee relied upon (the officer's report, which was quite detailed), the content of the written decision was acceptable, *Mujahid v. Apao*, 795 F.Supp. 1020 (D. Hawaii, 1992).

Other courts have set more exacting requirements for the written statement of the hearing committee, which is required by *Wolff v. McDonnell*, 418 U.S. 539 (1974). See *Redding v. Fairman*, 717 F.2d 1105 (1983), cert denied, 465 U.S. 1025 (1984).

Under the facts of *Mujahid*, the written statement, as general as it was, still pointed clearly at the evidence relied on by the Committee, and that was all that the court felt was necessary. Had the question of guilt not been so open and shut, a reference only to "written reports and testimonies" probably would have been insufficient.

Hunger Strike Ends after 19 Days

By Muna Muhaisen

Palestinian political prisoners ended their hunger strike last week after the Israeli Prison Authority entered negotiations with prisoner representatives and agreed to establish an investigative committee to look into the prisoners' demands.

The strike, which began Sept. 27, was called off in the northern prisons - led by Jneid Prison - Oct. 11, and in the southern prisons - led by Nafha Prison - Oct. 15.

A one-day partial hunger strike was observed in all prisons following the death of one of the striking prisoners, Hussein Ibeiday, Oct. 14.

Representatives of the Arab Lawyers Association outlined the prisoners' demands in a meeting Oct. 13 with Israeli Police Minister Moshe Shahal and Prison Commissioner Gabi Amir. To date, Israeli authorities have refused to meet most of the demands, agreeing only to "look into humanitarian issues the police ministry had, in any case, for some time planned to investigate."

Prison Commissioner Amir said the demands that will be met include more educational opportunities; longer family visits; installation of ventilators in the cells; and building a taller TV antenna to pick up Jordanian and Syrian television, instead of only Israeli TV.

But negotiators are still facing a deadlock on more crucial demands. These include closure of the isolation cells in Nitzan and Beer Sheba prisons and releasing prisoners who are too sick or too old to pose a security threat but are serving long-term prison sentences.

Other demands that vary from prison to prison - such as quality of food, exercise time, shortages of water, etc. - will be

negotiated by prisoner representatives and Israeli authorities in each prison individually.

The end of the strike brought a gradual end to the numerous solidarity sit-ins at Red Cross offices throughout the occupied territories.

The hunger strike prompted spontaneous violent confrontations with Israeli troops throughout the West Bank and Gaza Strip, resulting in the death of at least 14 Palestinians by Israeli gunfire and the injury of more than 500 Palestinians.

As confrontations with Israeli troops escalated, most cities in the West Bank and Gaza, including East Jerusalem, became reminiscent of the early days of the Intifada. Most reminiscent was Israeli Prime and Defense Minister Yitzhak Rabin's promise to use force to quell the protests.

Downtown areas usually crowded with shoppers were relatively empty and there was an apparent increase in the number of Israeli military patrols. By the end of the week, as it seemed the crisis was close to a settlement, demonstrations subsided slightly.

The most violent clashes took place in the Gaza Strip. By October 15, more than 800,000 Gazans were placed under curfew. Israeli authorities also announced the closure of several schools in Gaza and the West Bank until further notice because of anti-occupation demonstrations that had occurred there.

Source: *Al Fajr*

Exposure to AIDS Contaminated Sewage Banned

Prisoners at a Missouri county jail were involved in the large scale cleanup of raw sewage at the jail hospital. The sewage was contaminated with the AIDS virus from AIDS patients in the jail hospital. Prisoners were not provided with protective clothing during the cleanup nor informed of the risks of such contact.

The prisoners filed suit claiming their eighth and fourteenth amendment rights had been violated. The district court granted a directed verdict in favor of the jail officials but issued an injunction requiring them to provide adequate protective clothing and warnings to prisoners about the potential dangers of working in contaminated sewage.

Both parties appealed and the Court of Appeals for the Eighth Circuit affirmed.

The appeals court notes that district courts have broad discretionary power to order injunctive relief. Because jail officials had never warned prisoners or civilians at the jail that they would be working with dangerous waste from AIDS patients, the injunction was necessary to prevent potential health hazards violative of prisoners' constitutional rights. It's interesting to wonder at the officials and attorneys for the county who argued against this injunction. Why do they want to prevent people from knowing they face potential infection from working with contaminated waste?

The court affirmed the directed verdict in favor of the jail officials. The court held the plaintiffs had failed to present sufficient evidence to establish deliberate indifference to the risk of harm posed by prisoners working with contaminated sewage without protective clothing. Thus, the defendants were entitled to a directed verdict. See: *Burton v. Armontrout*, 975 F.2d 543 (8th Cir. 1992)

Wisconsin Parolees Have Liberty Interest in Avoiding Forced Medication

Jeffrey Felce is a Wisconsin parolee released on mandatory parole. While in prison Felce threatened prison and parole officials. They tried to commit him but were unable to do so because he was found to have mental problems but not to be incompetent. A condition of his parole was that he receive injections of Prolixin, a mind altering drug; under protest, he agreed. He filed suit against three Wisconsin parole agents for violating his right to due process in forcing him to take the drug. The district court dismissed the suit holding Felce had no liberty interest in parole without such a condition.

The court of appeals for the Seventh Circuit reversed and remanded.

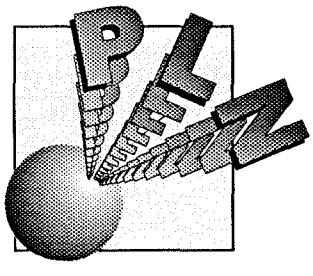
The appeals court notes that there is no right to parole and the state can impose significant restrictions before granting it. The court goes on to hold that Wisconsin mandatory parole release statues mandate a prisoner's release when they have completed two thirds of their sentence, unless the sentence is extended because of bad conduct.

Wisconsin statues also create a protectible due process liberty interest for prisoners and parolees not to be forced to take mind altering drugs unless they are formally committed to a mental health facility. The court then went on to find a "gap" in Wisconsin law when it came to parolee rights.

The court found that parolees have a qualified right to be free from involuntary drug use. In an ominous move, the appeals court extended the Supreme Court's "reasonableness" test (which requires courts to uphold all prison rules that violate constitutional rights as long as they are "reasonably related" to a "legitimate penological goal") of *Turner v. Safely*. This ruling specifically covers the forced medication of prisoners from the ruling in *Harper v. Washington*, 494 US 210, 110 S. Ct. 1028 (1990). In extending these prison rulings to parolees the appeals court held: "Parole is an extension of the prison walls...and the basic responsibility of the DOC toward the inmate is no less during that period than during incarceration." Hence, parolees' rights in this area are the same as those of prisoners. Which is to say, not much.

The court found that Felce was not afforded the minimal due process required by *Harper* prior to being drugged. That is because the drugging decision was not made or reviewed by an independent medical authority but was initiated by parole agents. The court found the Wisconsin DOC's grievance system to be inadequate because it did not provide for either outside review nor review by medically qualified personnel.

Despite finding a constitutional due process violation, Felce will receive no damages because the appellate court ruled the defendants were entitled to qualified immunity from damages. The case was remanded to the lower court for a determination of whether injunctive relief is appropriate. See: *Felce v. Fiedler*, 974 F.2d 1484 (7th Cir. 1992).



Deliberate Indifference Standard in Medical Cases Explained

John McGuckin is an Arizona state prisoner. In 1986 he was injured while in a prison camp. He did not receive medical treatment for his injuries, which by now included massive herniation of his back and upper torso, until 1989, three and a half years later. He filed suit claiming various prison and medical staff were deliberately indifferent to his medical needs.

The district court dismissed a defendant because he was not properly served with the complaint and granted summary judgment to the remaining defendants, dismissing the complaint.

McGuckin appealed and the Court of Appeals for the Ninth Circuit affirmed in part, reversed and remanded in part.

The appeals court held the district court had committed reversible error by dismissing the defendant from the suit by not notifying McGuckin of the deficiencies in his complaint and giving him an opportunity to correct the problem. Because prisoners representing themselves are more likely to commit errors of pleading they must be given greater latitude in the treatment of their pleading.

The district court dismissed the defendant not served with the complaint within 120 days after the suit was initiated. The problem arose when the defendant's name was misspelled on the complaint and compounded when the attorney general claimed to represent that defendant using yet another spelling, which was also wrong. The appeals court found dismissal on this basis to be inappropriate because McGuckin had correctly identified the defendant's address, occupation, name of his supervisor and the role he played in the civil rights violation; only his name was misspelled. The additional ground for reversal was that the district court had failed to inform McGuckin his complaint was deficient against this defendant and did not provide him with an opportunity to amend his complaint.

The court of appeals gives a detailed explanation of the standards by which eighth amendment medical claims against prison officials will be decided. The court elaborates on the two elements necessary to establish "deliberate indifference:" 1) the seriousness of the medical need and 2) the nature of the defendants' response to that need. A serious medical need exists if the failure to treat the prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. A serious need for medical treatment can be inferred by the presence of a medical condition that significantly affects an individual's daily activities, the existence of chronic or substantial pain or the existence of an injury a reasonable doctor or patient would find important or worthy of treatment.

The appellate court affirmed dismissal of the remaining two defendants holding the evidence in the record did not show they had been deliberately indifferent to his medical needs. The officials responsible for the three and a half year treatment delay were not named in the complaint.

In its conclusion the court notes this case exemplifies the problems of imprisoned pro se litigants and the courts inadequate response to their needs. The court notes that procedural errors will likely doom McGuckin's efforts to be compensated for the three years of pain and suffering he endured even though he probably has a valid constitutional claim. The most pathetic thing about this is that after the court makes this observation it does not appoint counsel to represent McGuckin, even though that is well within its powers. A classic example of the judicial shortcomings the court mentions. See: *McGuckin v. Smith*, 974 F.2d 1050 (9th Cir. 1992).

Legal Mail May not be Read by Prison Guards

John Reneer is a Kentucky state prisoner. He filed suit claiming violation of his first amendment rights when prison officials read his incoming legal mail in front of him. The prison warden claims he ordered a search of Reneer's incoming legal mail based on a suspicion he was responsible for the disappearance of mail logs from the prison mail room. The defendants claimed this was necessary to safeguard prison security. The district court granted summary judgment to the defendants.

The Court of Appeals for the Sixth Circuit reversed and remanded the case.

Kentucky prison regulations prohibit the reading of Reneer's legal mail. Reneer claimed the reading of his legal mail was done to chill his free speech and retaliate against him for exercising his right to seek legal redress of his complaints against prison officials. The court of appeals notes that the arbitrary opening and reading of prisoners' mail for harassment purposes violates the first amendment. The court rejected prison officials' claim that it was necessary to read Reneer's mail legal mail to search for missing mail logs. See: *Reneer v. Sewell*, 975 F.2d 258 (6th Cir. 1992).

Prisoners Support Guzman Defense

After the capture of Abimael Guzman, some friends of the Peruvian revolution contacted us and informed us of the worldwide effort to protect his life. A few revolutionaries here in Leavanworth federal penitentiary then got together to figure out what we could do. We felt we could raise some awareness of the struggle in Peru and the importance of Chairman Guzman as the principled leader of the revolution there. While money is short and hard to come by for most men here, we none the less felt we should and could be able to raise some funds too.

A petition was drafted that provided information on Peru and why it was important for us here to support that struggle, especially the effort to keep A. Guzman alive. Address slips were also made up listing where donations could be sent and information acquired on what was going on with the international campaign to protect and support Chairman Guzman.

A handful of trusted brothers quietly circulated these petitions. Over 150 men in Leavanworth signed the petition. In addition, I'm pretty sure that between $200 and $300 will be donated to the International Emergency Committee. Those who donated and signed the petition represent a wide cross section of prisoners. As the petition shows, all types of men supported this effort. Native Americans from various parts of the US, African/Black men, young and old, Latinos from many countries, Italians, Irish and other whites also signed. People identified with the Nation of Islam, Moorish Science, Muslims, christians, politically conscious, as political prisoners, revolutionaries, anarchists, RCP supporters, USMC vets, USA citizens, etc. In fact, very few people who were approached declined.

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Editorial Comments

By Ed Mead

My, how time's fun when you're having flies. Here we are opening the new year with the start of our fourth volume of the *PLN*. It doesn't seem that long. Publishing the newsletter has been a good experience for Paul and me. We've already learned a great deal, and we have lots of good ideas for improving our looks of the paper. With luck you will be seeing some of these changes in the coming months. I say with 'luck' because we are supposed to be getting our computers back shortly, and so will not have to rely on outside volunteers to do this aspect of the production process. And we can spend lots of time toying around with the paper, to make it look just right.

As I write this my fellow prisoners and I have just completed a two-meal boycott of the mess hall in protest of the poor quality of the food. The action was about 97 percent effective. It feels good to see such peaceful actions take place; it generates an empowering sense of solidarity. It's at times like these I feel best about my comrades in here; when I realize we are not totally under the government's thumbs.

It is true that our captors control every aspect of our environment, including physical custody of our very bodies. Even so, we are able to remain self-aware human beings with our identities intact. While lacking liberty, we nonetheless have certain freedoms as fundamental as life itself. We can decide for ourselves how this condition of existence (a condition of slavery) is going to affect us. And we can choose our response to this condition. Even as prisoners we have the freedom to choose between the criminal status quo and constructive change. This freedom is rooted in our collective power to say no. It is through the exercise of this freedom that we will find meaning in our suffering. It is the tool that will enable us to discover a measure of dignity, in spite of the prison experience.

The mess hall boycott exercised some of that freedom. And while the food certainly hasn't improved since the action, I think people at least feel better about themselves for having participated.

The other day Paul and I appeared on Channel 9 television, which is the Public Broadcasting Station in Seattle. We were appearing on a show dealing with jailhouse lawyers and why we sue. Before the TV crew came in, Paul and I got together to shape the message we wanted to get across to the public. During the taping of the program we did a pretty good job of communicating what a failure prisons were; how the courts are the only means we have of making our captors accountable for their actions; and that what they do to us today they will be doing to them out there tomorrow. Well, the message was totally gutted in the editing process, and instead some banalities we happened to make during the course of the taping were used. In short, our issues were trivialized. We were not all that surprised, though, as emptying the content from the message of the oppressed is something the bourgeois media is quite good at doing.

Last month we printed a correction in our 'letters' department, and a reader wanted to know what took so long to print it. Letters are our lowest priority in terms of content, so we usually don't print as many of them as we'd like. This is in order to make room for other material—such as legal blurbs, news items, and various justice-related reports. Our readers, on the other hand, really seem to enjoy the letters section.

You may have noticed that the last issue of the paper was 14 pages long, four more than our usual 10 pages. Every once in a while we must do something right, for a larger than usual number of donations come in. When that happens (as it did when we were able to give you 14 pages in August) we try to get a larger newsletter out to you. So be sure to keep those contributions rolling in. And remember, a complete accounting of every cent we take in, as well as every penny we spend, is available to any prisoner-reader or family member upon request.

This seems like as good a time as any to remind you that subscriptions to the *PLN* are not like those to a bourgeois publication, with a one-time contribution or fee. Your financial support must be just as continuous as our commitment to regularly provide you with the best prison-related information we can gather—it must be ongoing. Paul and I make up any shortfalls in the production and mailing costs out of our own pockets, from our meager prison wages. While we are not hurting for money now, we don't want to wait until the wolf is pounding at the door before reminding you to kick us down something. If you have not assisted us lately, then do so now. We're here for you; be there for us.

I generally like to close my editorial comments off with an instructive quote. After reading about a survey in which Washington citizens said they would be willing to give up constitutional rights in order to be more safe from crime, I came across this little jewel by Benjamin Franklin. He said: "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety." See you next month.

Length of Work Day Increasing

One of the most ancient ways to increase returns from the exploitation of labor, Karl Marx noted in Volume I of *Capital*, is to lengthen the working day. Slave owners, feudal lords, and capitalists had that device in common. In a recent book, *The Overworked American: The Unexpected Decline of Leisure Time*, Harvard economist Juliet Schor notes that in 1987 the average U.S. worker labored for wages 163 hours longer per year than in 1969. Somewhere in less than two decades a full month of labor per year had been added and the same amount of leisure deducted from our lives. During the 1980s alone, the book says, we lost three and a half days of vacation, holiday and other paid leaves from work.

PETITION (Continued from previous page...)

Besides getting a signature and passing on an address slip, a lot of discussion about the struggle in Peru, about revolution, about Maoism, and the state of things today took place. Copies of articles on Peru were passed around. It was positive to find that many people already had good information about the revolution in Peru and very few people were caught up in the kind of misinformation that the U.S. government and media put out. For example, one brother who is a Muslim fundamentalist political prisoner from the Mid-East said: "Guzman, yes, we know about him. Let me sign, he is a good man, a good leader of his people."

J.L. Leavanworth, KS

Latin American Prisons

By Guillermo Gonzalez and Dario Brenman

[*PLN readers have read as we have regularly reported on the state of the U.S. prison system and its many abuses and faults. You may wonder, "how are things in prisons elsewhere?", well we wondered about this too. In future issues of PLN we hope to bring you articles on the prison systems of other countries, especially the capitalist countries who rely on prison as a means of social control. In most cases we find the similarities to the U.S. model are greater than the differences. The following was edited for length and translated by myself from* **Brecha**, *an Uruguayan weekly newspaper. Paul Wright.*]

On paper at least, Latin American countries acknowledge that prisons are not to torment and that prisons should seek the re-education of the convicted and assure their aptitude for work and deter them from crime. Reality does not conform to these good intentions. A report by Dario Brenman for *Brecha* - from Argentina - and materials compiled by the editorial staff allow an approximation of a sub-world that is neither foreign nor far.

In Latin American prisons there is a readily proven common denominator: close to 90% of the prisoners come from sectors of critical poverty and social marginalization. The majority come from the big urban conglomerations and the mass media takes care of depicting them as the most violent and dangerous criminals.

Needless to say, for current criminology, that crime which can happen at any moment is of the sixteenth order. The crimes that really matter, and which exist in all the Latin American countries, and even throughout the world, are financial frauds which originate on the red carpets of the ministries, the transnational corporations, and the banks. These are the aspects of crime which prioritize the worries of criminologists and penologists as they take into account the fact that the crimes of misery - which take so many people into the region's prisons - are a consequence of, or originate in, these illicit crimes. Elias Newman, an Argentine criminologist, states that: "it's always the same people in this continent's prisons; the years go by and it seems like I'm seeing the sons of the ones who were here before and the fathers of those who will come later."

Mexico is the Latin American nation with the most prisons: 485 for a population of 82 million inhabitants. Specialists in that country claim that: "The prison apparatus constitutes a big industry from which many people live." With more irony than candor they maintain: "If crime didn't exist many more people would be out of work." Mexico has more prisons that all the other countries combined.

Without very precise data, it is known that the prison structure of Brazil is atrocious. According to Flavio Borges D'urso, a government official: "In Sao Paulo alone there are nearly 8,000 prisoners crammed into Carandiru Penitentiary. Throughout the country there are close to 110,000 prisoners in 47,000 cells. The disproportion worsens according to region, where in the southeast there are more than 3 prisoners per cell and the deficit is greater still because there are another 300,000 convicted prisoners without any cells whatsoever." One solution to overcrowding comes from the prisoners themselves who play Russian roulette, and the dead have escaped any type of statistical control (the other control, that of the authorities, simply doesn't exist.)

Human rights activists recently mobilized due to the outcry over a death in Lurigancho prison, in Peru, the same one in which a massacre of Senderista prisoners took place in June of 1986. The warden's first reaction was to the deny the death had occurred, finally he admitted it. The corpse was still in the cell it had occupied in life, covered with garbage by its companions. And not only that body turned up. Investigators found other skeletons of prisoners that had never been removed from their cells. The recent confrontations between the government and the prisoners of the Shining Path in the Canto Grande maximum security prison, which left at least 23 dead and 58 wounded, show the type of perversions that reign in the Peruvian prison system.

In any case, the Latin American prisons seem to imitate the United States model in which a definite selectivity is applied in which only Blacks and legal or illegal immigrants (generally Spanish speaking) are the ones who wind up in prison. The repressive politics in the Latin American countries has not had a strong response beyond sporadic riots when conditions are intolerable.

The timid and inconsequential efforts to change this situation have not only been unable to reproduce themselves, they have all ended, for various reasons, in failure. One case is that of the open prison in Bragado, in Buenos Aires province, which failed due to political problems. Another in Mendoza (Argentina), closed in 1981 after 11 years, with 163 prisoners capable of sustaining itself and supplying food to other prisons. Other open prisons in San Pablo and Rio Preto, Brazil, became more and more repressive, until their closure due to high drug use.

Los Espejos, Bolivia

Very close to Santa Cruz, in Bolivia, was Los Espejos, which the authorities said functioned as "a farm for the rehabilitation of prisoners." It was directed by a police colonel with 15 agents which seemed sufficient to control the 110 to 150 prisoners, most of them common criminals, "pitiyeros" (marijuana smokers) and undocumented minors the police detained on roads and highways.

Over the years allegations were made of bad treatment, forced labor and deaths. It was also said that Colonel Camacho, the warden, had a ranch near the prison and there he sold everything the prisoners produced for his own profit. During the harvest season he would rent out prisoners for 2 Bolivian pesos a piece, per day, "for the prisoners upkeep."

In 1989, the Center of Judicial Studies for Social Investigation gathered a group of forensics experts, and an American, Clyde Snow, to investigate Los Espejos. There was a lack of political support so the group went to the prison farm claiming to be criminal lawyers studying the Latin American prison system. The only way to enter Los Espejos, they said, was under a false identity, then verify everything they could and later obtain the necessary support from La Paz (the capital).

With hidden recorders they took testimony that corroborated the allegations and which, in addition, spoke of a clandestine cemetery called "the plantation." The Argentine forensic doctor who directed the investigation recalls that "the minors as well as the adults were dressed in rags and barefoot and even in front of us they were clubbed and beaten by the guards. There they were forced to work from 6 in the morning until 6 in the evening. The first visit let us observe the place but we couldn't do any excavations yet because we lacked political support. We felt that the government was an

Continued on next page...

accomplice to what was happening at Los Espejos because the abuses were continuous."

His relationship with Colonel Camacho broke down when they asked him about the cemetery. "What cemetery", he replied very seriously, "there's nothing like that here." After more insistent questioning he gave in. The experts estimated there were close to 50 graves. Camacho argued all had died of natural causes. In the following days the exhumations (all of the cadavers were anonymous because no one knew the names of the dead and Los Espejos lacked records of who came in and who left) revealed that some had bullet wounds in their skulls and broken ribs from beatings. When this accumulation of evidence made Camacho's position unsustainable he chose to free all the prisoners, gave them 5 Bolivian pesos and told them to leave "right away". After 2 years, the investigatons learned that in February of 1991, 12 people were arrested, including Camacho. The prison was closed and police delivered it to the Red Cross.

Military Police Massacre at Least 111 in Brazilian Prison

On the night of Oct. 2, just hours before nationwide municipal elections, the Military Police swept into Sao Paulo's Carandirú Prison, Latin America's largest, and killed a still unknown number of inmates. Officials originally put the death toll at 111; on Oct. 7 the federal Justice Ministry said about 200 had died; based on prisoner lists for the cell block, a surviving prisoner calculates that a total of 284 inmates are missing and should be presumed dead.

Prisoners and official sources agree that the incident started with a knife fight among inmates during the afternoon; the official version is that there was also a plan for a mass jailbreak. Sao Paulo State Security Secretary Pedro Franco de Campos says that guards attempted negotiations but gave up "because it was getting dark. We couldn't have a mass escape from that prison the day before elections." The Military Police claim the prisoners attacked them as they entered the cell block, but a prisoner reports that "[t]he soldiers shot each other [in the dark] and they became furious when they saw their companions wounded." Prisoners, lawyers, and religious human rights workers all describe a brutal massacre in which guards beat and knifed some prisoners, machine-gunned some others, and unleashed police dogs on the rest. Many prisoners were shot in the back of the head after surrendering; some were killed after being compelled to carry away the bodies of other prisoners. "The police said they couldn't leave witnesses. The ones who survived the shootings and knifings were murdered by the dogs," a prisoner said. The next day a police officer told a prisoner's mother that "the dogs had fresh meat last night."

"The brutality...surpasses the atrocities of the war between Serbs and Croats," says one lawyer associated with the PT. Sao Paulo State Governor Luiz Antônio Fleury Jr. dismissed security chief Campos on Oct. 8 and put the prisons under the control of a new prison affairs department. The Oct. 2 incident is the worst of a number of massacres in Brazilian prisons. Thirty-two prisoners died in a 1987 disturbance, also in Sao Paulo. Last year, guards in Rio de Janeiro used an incendiary bomb to murder 25 inmates of a subterranean prison. A police captain involved in the latest assault, Wanderley Mascarenhas de Souza, was already known in the local press as one of the city's "five biggest killers," with a total of 34 killings in supposed shoot-outs with criminals.

Source: *Nicaragua Weekly Update*

Rampant Violence in Venezuelan Prisons

The situation inside Venezuela's prisons reflects the serious deficiencies in the country's protection of human rights.

According to figures from the Public Ministry's Human Rights Office, so far this year more than 160 prisoners have been killed inside Venezuelan jails.

Fighting between rival gangs to control drug trafficking, failure to separate criminals based on the severity of crime, corruption among prison authorities, serious overcrowding and lack of basic services, failure to grant promised benefits and an extremely slow legal process are the main causes of the prison crisis.

For a majority of inmates, their prison stay is a constant struggle for survival. It is a daily fight for a patch of ground to sleep on, for a piece of bread to eat, even for use of the bathrooms. Inmates also compete to have their cases brought to a court - for which they pay huge bribes to the prison guards - to receive written proof of their detentions.

The most serious charge, however, is that inmates also pay off guards to control the flow of drugs within the jails. In addition to being a leading cause of the violence among prisoners, drug trafficking within the prisons has also corrupted penal authorities, who, with increasing frequency, are being implicated in the trafficking.

In many judicial investigations of the prisons, investigators have said that prison authorities are responsible for selling weapons and drugs to inmates. Judges and prosecutors conducted surprise inspections of six penitentiaries around the country in 1991. Large quantities of drugs and weapons were discovered in the administrative areas of each prison.

The Public Ministry requested that the authorities who participated in the inspections prepare reports of their findings. More than half-way through 1992, however, none of the reports has been finished.

For human rights activists, what is more serious is that there has been no indications that any improvement is likely.

According to the human rights director of the attorney general's office, the Rev. Luis María Olaso, the prison situation is a moral problem and an issue of justice. "Those who have the power to make decisions have limited what the attorney general's office can do. The justice system has paid little attention to our recommendations."

María Dubayle, Venezuelan journalist

[*Editor's note: as this came to press we received word that in the wake of an unsuccessful coup attempt and civil disturbances, the prisoners in the central prison of Caracas rioted. At least 42 were killed when the armed forces stormed the prison. It was the second prison uprising in 10 months.*]

Aborigines Have High Jail Death Rate

Nineteen Australian Aborigines died in police cells and prisons in 1990 and 1991 despite a multimillion dollar inquiry aimed at stopping aboriginal deaths in custody, according to a recent report.

The continued over-representation of Aborigines in Australian prisons was a major contributing factor, the report by the Australian Institute of Criminology said.

The 19 aboriginal deaths represent 16.7 percent of the 114 deaths in custody over the two-year period. Aborigines account for only 1.5 percent of the Australian prison population.

Letters From Readers

Needs Some Information

I would like to take this opportunity to express my appreciation for the excellence of service provided by *PLN*. I have been incarcerated for ten years now. As it stands, I am incarcerated at the State Correctional Institution at Rockview serving a life sentence. I have come to learn that there is nothing in terms of legal counseling, updated legal materials, etc., to assist prisoners here at this institution. I am considering implementing a legal law class to assist prisoners in preparing appeals, researching, and so on.

On the other hand, this institution does not encourage activities like helping other prisoners with their cases. I feel it is wrong to deprive those who are not knowledgeable in this area. You would be shocked to know that 80 percent of this population does not know how to prepare for their appeal. Any comments or suggestions would be appreciated. Are there any referrals in this area that could assist me in this goal? And what can I do to protect myself from retaliation from prison administrators? I am not breaking any infraction because the DOC encourages prisoner to prisoner legal help. It's just that this prison does not encourage it. They are afraid that once prisoners learn anything on the legal aspect, lawsuits would be springing up all over the place—against them, of course. Any materials or advice your readers could give me would be appreciated.

Harold Askins AM-9603
P.O. Box A
Bellefonte, PA 16823

Likes Whitehorn Article

Yesterday, I received my sample copy of your newsletter. I read it in its entirety as soon as I removed the staple.

Your piece on W.S.R.'s litigation was very interesting as the institution I have been incarcerated in for the past dozen years, the Indiana State Reformatory, has been under a similar court order to reduce crowding and improve conditions. As in your situation, the state has been drug screaming and hollering into complying with the ruling, and lately has been backsliding on several issues. You have my sympathy.

What really piqued my interest, however, was Laura Whitehorn's article "Resistance At Lexington." More power to our sisters behind bars and wire! It took great courage and spirituality to draw their line and stand by their decision. No rebellion by prisoners, peaceful or violent (I've been in both), is ever committed because of petty reasons; it takes great provocation and continuous institutional abuse. I salute the valiant sisters at Lexington.

Whitehorn's article also struck a nerve because of the similarity in protest that occurred here at I.S.R. in November of 1991. The totally peaceful series of unity walks around our recreation field so unnerved the administration that the joint was locked-down for the next several months. It was the longest lockdown in state penal history. To this day there has not been a justifiable rationale ever provided.

J.T., Indiana State Reformatory

Encore

Please put the enclosed $20 check toward the costs of publising the *PLN*. We enjoy every issue. I Heartily agree with Ed Mead's applause of Bob Stalker's performace on behalf of prisoners. Encore, encore!

M.H., Richland, WA

Pendleton News

I am writing to you from inside the walls of Pendleton, the Indiana State Reformatory. Since November of 1991 we have gone through a systematic deprogramming. All programs have been abolished. Vocations, education, spiritual, and psychiatric for 80 percent of our population. Very few in the cellhouses remain employed in any capacity at all. We have dorms which are used as "launch pads" to propel offenders into over-crowded level 3 facilities. The absolutely worst part is that they have blocked access to every rehabilitative means available, even if purchased at personal expense (with the exception of two very expensive schools, which few can afford to pay). We earn absolutely no wages, and so on.

The administration has gone so far as to eliminate direct access to the law library, instead giving us offenders trained (what a joke) as law clerks. We can't even call our attorneys without a request in writing 14 days in advance for us to do so.

We are left with an unending drone of television. The only reading materials we can have are those mailed in by family members, while the 10,000-book reading library is completely beyond our access. We are confined in our cells nearly 23 hours a day (recreation is two hours, every other day). If your readers have any sources of information for us 2,000 men would be really grateful.

J. Ford # 901029
Indiana Reformatory
P.O. Box 30
Pendleton, IN 46064

McNeil Island News

They plan to open 1,000 new beds in January, and have added no new room to the hospital or kitchen. It already takes five months to get any dental work done, and I'm thinking of preparing a § 1983 on the whole hospital as it is. Being at this place gives me an idea of how deep the cancer runs in the system. When I see some of the crap that goes on [here] it affirms my politics, like nothing else I have experienced.

R.P., McNeil Island, WA

On Taking DNA Samples

[*The following letter was written in response to our article "Taking DNA Samples Violates Ex Post Facto Clause" in the September 1992 issue of the newsletter.*]

My name is Dale Gardner. I am currently incarcerated in the State Correctional Institution; Huntingdon, PA. I am writing in response to your article on D.N.A. testing. Before I begin on my personal feedback of the article, let me explain my education background; I graduated from Stanford University earning my doctorate in biochemistry genetics. After completing my internship at Roach Biomedical Laboratory in Pennsylvania (a state contracted company of D.O.C. to research and analyze drug urine samples from prisoners), I went into private practice conducting behavior modification research. In 1990, I was arrested for manufacturing controlled substances.

While incarcerated I contracted a serious lung infection, which was neglected by medical personnel. Therefore I filed a complaint pursuant to § 1983 for lack of proper medical treatment. I represented myself, and requested a federal court to review my medical records for errors. I was granted this request. During review of those medical records, I came across what is called a karyotype chart. If you are familiar with the context of the stated article, this chart consists of the DNA

Continued on next page...

"blueprint" mentioned. It looks like an 8½ X 11 inch X-Ray, consisting of the human chromosomal pattern. Now what you might not know is there are four laboratories authorized in the United States to conduct Karyotype chart analysis, one being Roach Biomedical Laboratory in Pennsylvania, my former employer. Any Karyotype chart is marked with the medical lab's official seal in the upper right corner. After reviewing this, I requested the same court to order a reproduction of this chart. Granted. I had also studied law and criminology for some time. Now in any criminology text, it will list numerous journal cites similar to legal citations. I came across a research project endorsed by thirteen state departments of corrections (Washington, Pennsylvania included), financially backed by the RAND Corporation in New York, and authorized the research carried out by Roach Biomedical Laboratory in PA. The test date of the project was 1983, and has no conclusion date. This project, I had small knowledge of it, was in action during my internship, under Dr. _____ [name withheld at author's request], my research department head.

The research was specifically to compile technical data on the so called xyy chromosomal abnormality linking criminal behavior to D.N.A. abnormalities. I contacted this doctor, requesting a visit be planned to discuss this information. We discussed at length the research being conducted. He stated to me, "'off the record,' the information was to be originally used for confidential purposes by the parole boards, to render its decisions." After amending my original complaint to include this information, all medical records were labeled 'confidential' by the institution. They are currently appealing the federal judge's decision to open the records up. Now to solidify my argument, I'm making arrangements for this doctor to testify (however, he agreed to a contract with Roach Biomedical not to discuss "any research conducted to anyone"). His contract is currently in federal court to test the legality of this. The court has possession of the contract signed by both the D.O.C. and Roach Laboratories for this project, number R.B. 698449.

I totally disagree with the judicial opinion of *Jones v. Murray*, 962 F.2d 302 (4 Cir. 1992), which says: "The court notes that taking of blood samples for D.N.A. analysis is not significantly different from taking prisoners' fingerprints or photo. The government has an interest in preserving a permanent identification record of convicted felons which outweigh any intrusion caused by the taking of blood samples." The reason for my disagreement is that this research is not scientifically approved in the majority of the American Medical Association Standards of Professional Research. We cannot begin to measure the extent, the parole boards, or any criminal justice agency interprets this questionable data. However, research conducted on the use of D.N.A. for identification purposes in criminal cases have been upheld, both by the legal and medical organizations.

This letter was written to you, in hopes of being published by *PLN*. There are many misconceptions about D.N.A. research and its role in the criminal justice system.

Dale Gardner # BI-5107
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Serial Litigators

By Adrian Lomax

A recent Associated Press story reported that the state of Wisconsin is spending more than a million dollars a year defending lawsuits filed by prison inmates. The story identified two Waupun prisoners as "serial litigators," responsible for numerous legal actions. A state lawyer was quoted as saying the amount of money that prison lawsuits cost the taxpayer is "obscene."

As with all problems in our prison system, Department of Corrections officials place the blame on prisoners, and the mainstream press follows in lockstep. Not surprisingly, the fault actually lies with those who wield official power.

In 1989, Waupun administrators cut in half the size of the prison library, including the law library. This move reduced both the materials available in the library and the number of inmates allowed to use the library at a given time. Prison officials did this at a time when the prison's population was expanding. As a result, the number of inmate requests to use the library increased while the number of library passes issued each day decreased, creating a large backlog. Since 1989, Waupun prisoners have had to wait at least three weeks, and sometimes as long as nine weeks, to use the library.

Prisoners complained vigorously about this drastic cutback in access to the library. Their complaints were ignored by prison officials, so the prisoners resorted to the only recourse available: they filed a lawsuit in federal court.

In April, the federal district court in Milwaukee ruled that the Waupun library is so inadequate that it violates the prisoners' constitutional rights. This particular lawsuit was intensely litigated for three years. The prisoners were represented by the prestigious law firm Foley & Lardner. Because the prisoners won, the state must now pay the fees of the prisoners' attorneys.

The cost to the state of paying the fees of its own attorneys and the prisoners' attorneys in this case will surely run into the tens of thousands of dollars. Who caused this expense to the state treasury? All the prisoners wanted was access to a library, hardly an unreasonable demand. The burden on the treasury for this litigation is the result of prison officials who act without any regard for the law or the rights of prisoners.

On May 23 approximately 30 Waupun inmates assaulted several guards. The institution has been locked down since then. As of August 2, the date of this writing, the prison library has not been reopened. In response to complaints about denial of access to the library, Waupun officials cite "prison security," their ever-faithful excuse, as the reason for their actions. However, all the inmates involved in the May 23 disturbance are now confined in segregation and many have been transferred to other prisons. The extended closure of the library has no connection whatsoever with prison security needs. It is caused only by Waupun officials' intense desire to deny prisoners access to books and knowledge, much as plantation owners denied slaves the opportunity to read.

Several prisoners have already filed lawsuits challenging the closure of the Waupun library, and many more will surely follow. Thousands of taxpayer dollars will be spent defending the completely illegal and ridiculous actions of Waupun officials.

I've focused on lawsuits concerning the prison library only because they provide a good illustration of lawsuits necessitated by the lawlessness of prison officials. There are a hundred other examples. Waupun inmate Donald Woods was choked to death by prison guards two years ago. Woods' family has filed a lawsuit that will certainly cost taxpayers a large sum. The recent death of Waupun inmate Joseph Griffin, after extreme neglect of his medical needs, will likely result in a similar lawsuit. Last year a jury awarded WCI inmate Oscar McMillan $23,000 for being illegally confined in "the hole" for six months.

Prison officials routinely deny inmates access to public records maintained by the DOC, resulting in numerous lawsuits pursuant to the state's Open Records Law. State Representative Leo Hamilton (D-Chippewa Falls) has referred to the DOC as "the CIA of state government" because of prison officials' extreme secrecy.

In 1980, UW chemistry student Barbara Hoffman was convicted of the cyanide murder of her fiance, who had named her the beneficiary of his life insurance policy. The Hoffman prosecution was widely publicized and is the subject of the book *Winter of Frozen Dreams* by Karl Harter.

In 1989 I requested a copy of a DOC document pertaining to the Hoffman prosecution. The DOC denied my request, claiming that revealing the nature of Hoffman's criminal offense would threaten prison security.

I filed a legal action to obtain the document. Because the DOC's reason for denying me the document was patently absurd, the court ruled in my favor. The DOC squandered thousands of dollars defending that lawsuit.

Prison officials have since denied my requests for documents relating to the prosecution of Lawrencia Bembenek and Jeffrey Dahmer. I have not filed legal action to obtain those documents, but I could easily do so. If I do, the DOC will spend taxpayer money to hire attorneys to argue that revealing what Bembenek and Dahmer are in prison for will cause untold harm to prison security.

Wisconsin prison officials believe that they should be able to do whatever they wish, state statutes and the U.S. Constitution be damned. And every time they're sued for acting illegally, prison officials spend freely from the public purse hiring lawyers to defend their actions. I agree that vast sums of public money are wasted defending DOC officials from lawsuits initiated by inmates. But the cause of this waste is not a group of overly litigious prisoners. The cause is a cadre of intransigent DOC bureaucrats who firmly believe that the law doesn't apply to them. Source: *The Madison Edge*

The Prison Privatization Debate

By Ed Mead

"Prisons are by their very nature coercive and oppressive institutions, designed to disempower and destroy the resistance of those confined within them, so any discussion of 'reform' is largely meaningless and futile. Prisons, whether controlled and operated by the state or private companies, are weapons utilized by the powerful to keep the powerless in check, and to maintain an economic and social status quo beneficial to the former."

John Bowden,
British Political Prisoner

When approaching any political question on the inside of the nation's prisons, it is important for us to start from a radical rather than a liberal or reformist perspective. This is just as true when considering the growing issue of prison privatization.

My starting point is that it is good and progressive to work to extend democracy, as the ultimate realization of that ideal will necessarily result in the complete abolition of prison slavery and the establishment of a social order in which economic justice is an integral element of what today's rulers cynically call freedom. In other words, struggling to extend democracy is a battle that will extend all the way to the gates of power.

The struggle to merely change prison conditions, on the other hand, is one that can be readily granted. Indeed, reform is the state's second response to demands for cosmetic change (the first response, of course, being the iron fist of repression). But more comfortable prisons are not what we seek. To quote John Bowden again, who was writing in the January 1993 issue of *Fight Racism Fight Imperialism* (*FRFI*) when he said:

> "Prisons, good or bad, can have no 'positive emphasis' beyond controlling and disciplining prisoners, and in fact the so-called 'good' prison regimes are far more sinister in terms of the way they seduce and brainwash prisoners into conformity. Living in a velvet-lined coffin is essentially no different from confinement in an obvious hate-factory -- either way one is controlled and imprisoned against his will."

Comrade Bowden goes on to note that our terms of reference must be shifted when discussing how prisoners' rights might be extended, "from a rather unrealistic and counter-productive paradigm of 'improved' prisons and 'caring' prison officers, to one that situates the struggle of prisoners clearly in the context of revolutionary class struggle and anti-capitalist politics."

It is from within this context that we examine the privatization question. It should be clear from the foregoing that privatizing prisons would in no way diminish the fundamental nature of these institutions. But will bringing in corporate management make conditions better? This is an important consideration for our many liberal readers, whose vision of the future fails to extend beyond the issue of more comfortable cages. I'm writing on this subject because it is an important topic of consideration in Great Britain, where large-scale plans are underway to implement a prison privatization campaign, and because many prisoners in this country believe private corporations would do a substantially better job of running the various prison systems.

One argument put forward in support of privatization, this one by Stephen Windsor, a man who has spent eight year in Scottish prisons, is that the program has worked so well in the United States that it should be implemented in Britain. Windsor, writing in the January 1993 issue of *FRFI*, says: "In America prisoners benefit greatly from private companies investing in training and employing prisoners with a guarantee of employment upon release." That perception, however, lacks a material basis in fact.

A closer look at the reality of private prisons in the U.S. reveals a somewhat different picture. For example, as we reported in the January issue of the *PLN*, prisoners from a privately-run joint in Louisville, Kentucky have been used as scabs in the strike by UFCW Local 227 against Fischer Packing Company. The prisoners were brought into the plant after the strikers rejected the company's "best and final offer" by a margin of 402 to 2. Fischer was demanding large concessions.

According to a story in the *Louisville Courier-Journal*, the private prison "has been supplying inmates to a temporary employment agency that has used them as strikebreakers at Fischer Packing." The union objected to the local government, but the inmates were still working in the plant. The Union was forced to call for a boycott of Fischer products.

So you see, far from being well paid workers by our corporate masters, we can easily end up being underpaid scabs who bolster capitalist profits at the expense of the working class.

The concept of private prisons are not some new wave of the future, but rather a holdover from medieval England that were litigated out of existence in the U.S. 25 years ago because of dark and evil practices. As one trial judge put it, a practice "of physically abusing inmates and profiting from their labor." The revival of this push to return to the barbaric practices of the past, where prison labor was farmed out for personal profit, is the brainchild of the most reactionary element of the ruling class. In this country these backwater notions attained a sense of legitimacy from the likes of former president Reagan, who wanted to "privatize" all sorts of government services. And also by former Chief Justice Warren Burger's campaign to make prisons in to "factories with fences," where prisoners would be forced to work to offset the cost of their incarceration.

As for vocational training from any privatized prison, I am not aware of a single example where such teaching takes place. Nor have I ever heard of any prisoners having guaranteed employment upon release, except in the case of the former Soviet Union. Every prison industry I've worked in had one goal, and that was to make a profit. We are not even given vacations, paid or otherwise. While wages sometimes appear to approach the minimum wage, when taxes and mandatory payments for the cost of imprisonment are factored in, the prisoners often wind up making more money by working in some non-industrial area of the prison. In any event, virtually all prison industries are jobs long ago shipped to Mexico and the so-called Third World, or which are done by illegal migrant labor (i.e. sweatshops) or at best on the outside making minimum wage, like telemarketing (the boilerroom). These are not the kind of jobs through which one is able to acquire meaningful employment skills or likely to result into a decent paying job on the outside. If they were, they would not be in prison to begin with. What we are talking about is more low paying, dead-end shit jobs.

The argument is sometimes raised that nobody could do a worse job of running the prisons than the people who are

Continued on next page...

doing it now, that any change at all would necessarily be an improvement. Even if true, the logic of such reasoning will be short lived. The moment the corporation must make a decision between the quality of your food, education, or medical care, on the one hand, and company profits on the other, you will not need a calculator to figure out which priority will come first. Just look at their track record now, when they are trying to put their best foot forward.

A case that readily comes to mind is the 1988 death of Rosalyn Bradford, a black woman prisoner at a place run by the Correctional Corporation of America (CCA), the Silverdale Work Farm in Tennessee. The woman died of complications from a tubal pregnancy after guards, believing she was faking, let her scream in her cell for 18 hours before taking her to a hospital. The CCA prospectus, in language repeated almost verbatim in the contracts, pledges that "employees must undergo at least 160 hours of training by the company before being allowed to work in a position that will bring them in contact with inmates." But the guard who attended Ms. Bradford says that she, like many others, was put to work a few hours after being hired, and that she did not receive first aid training until a week after Bradford died!

Steven Windsor believes incidents such as the example just cited will not happen because "a government inspectorate...would make sure certain standards were set and adhered to." Yeah! Just like the government regulates the industrialists around today's feeble environmental, health, and safety laws; just like they regulated our savings and loan institutions. In point of fact, private prisons are essentially unregulated. This is because few state or local governments are willing to establish strict standards for fear of creating a set of entitlements that would encourage inmate lawsuits. Moreover, even modest standards, whether or not they were implemented, would work to discourage corporate investment in this area.

David Wecht, writing in the March 1987 issue of *The Yale Law Journal*, cautions that standards would be hard to enforce, especially "several years after the life of the [privatization] contract, when corporate control of the state's penal system may have reached the point that the government no longer has the expertise, personnel, facilities or fiscal resources to run the prisons." Also, according to the August 1988 issue of *In These Times*, "More than one local government, after contracting out its prison or jail, has later asked how it is being run only to be told that such information is 'proprietary'."

Capitalists are driven to seek higher profit margins; it's the nature of the beast. When you go to a disciplinary hearing in a prison that is operated by a private company, you can bet you will lose good time credits. Terms will be extended to ensure there is never any empty bed. The existing system is already capacity driven; putting direct profit into the picture would only mean there would never be the lost revenue represented by an empty prison bed.

I for one have no desire to see this budding trend carried to its logical extreme: where we are treated to the sight of a multinational corporation like General Electric pulling the switch on some poor sap strapped into an electric chair, while airing the event on its NBC television network to the theme music of "GE brings good things to life." If the ruling class wishes to continue their enslavement of a segment of society, they should not be permitted to do it directly, for the purpose of profit. Their intermediary instrument of repression, the bourgeois state, is quite well suited to that task.

Pre-trial Detainees Don't Have to Work

Jorge Martinez is a federal pre-trial detainee. He filed suit claiming that while he was held at the US Medical Center for federal prisoners he was denied proper medical care for a dislocated shoulder, was force fed after seven days on hunger strike, and was placed in segregation for refusing a work assignment. The district court dismissed the complaint, before service on the defendants, as being frivolous.

On appeal the court of appeals for the eighth circuit affirmed in part and reversed in part and remanded.

The court affirmed dismissal of the medical treatment claims because attachments to the complaint showed he did receive medical treatment. The court notes that prisoners' disagreement with the course of medical treatment does not give rise to a constitutional claim. Likewise, the claim that he was force fed after seven days of a hunger strike also failed to state a claim.

The court held that Martinez' claim that he was placed in ad seg for refusing to work does state a claim and should not have been dismissed prior to service.

The court notes that pre-trial detainees are presumed innocent and may not be punished. The determination of whether a particular restriction or condition of pre-trial confinement is punishment turns on whether the restriction or condition is reasonably related to a legitimate governmental objective. "Requiring a pre-trial detainee to work or be placed in ad seg is punishment and thus forbidden," according to the court.

The court notes that requiring pre-trial detainees to perform general housekeeping chores is allowed. Federal regulations provide that pre-trial detainees may not be required to work in any assignment or area other than housekeeping tasks in the detainee's cell.

The lower court erred in dismissing the suit because, due to the lack of a record, it could not determine what, if any, work was being demanded of Martinez. The claim was remanded to the district court for reinstatement and service on the defendants. See: *Martinez v. Turner*, 977 F.2d 421 (8th Cir. 1992).

BOP Agency for APA Purposes

Garvin White was a federal prisoner at Leavanworth who was accused of attempting to escape and was transferred to Marion. At Marion he was infracted for the attempted escape. The hearing officer did not render a verdict until 4 months after White's arrival at Marion. The hearing officer dismissed the charges because the delay violated Bureau of Prisons (BOP) regulations.

The BOP regional director rejected the hearing officer's dismissal and directed him to determine if the delay had prejudiced White. The hearing officer held a second hearing, concluded White was not prejudiced by the delay, found him guilty and withdrew 710 days of good time.

White filed a habeas corpus petition seeking return of his good time on the grounds that under the Administrative Procedure Act (APA) the BOP regional director lacks the authority to review the hearing officer's decision. White contends that because nothing in the BOP's published regulations authorizes such a review, that review is forbidden. The district court granted summary judgment to the BOP defendants and White appealed. **Continued on next page...**

The court of appeals for the seventh circuit affirmed. The appeals court held that the BOP is an "agency" for APA purposes. This directly conflicts with the ninth circuit ruling in *Clardy v. Levi*, 545 F.2d 1245 (9th Cir. 1976), which held the BOP is not an agency covered by the APA.

The seventh circuit went on to hold that even though the BOP is an agency for APA purposes it does not have to abide by its own rules. It held: "An obligation to hold a hearing is only part of the APA's formula, however formal hearings are unnecessary unless hearings must be 'on the record'. Prison disciplinary hearings are - and so far as the constitution is concerned may remain - informal hearings conducted without a record. The court recently described the employees of the Bureau of Prisons who handle discipline as 'the direct subordinates of the warden who reviews their decisions...' no judicial trappings, no independent adjudicators here."

The court held that White did not show he had been prejudiced. That just because the BOP violated its own rules, which might call for relief under the APA, does no entitle prisoners to collateral relief on a habeas corpus petition seeking restoration of lost good time. As the court put it: "Procedural gaffes do not make that custody illegal or unconstitutional." See: *White v. Henman*, 977 F.2d 292 (7th Cir. 1992).

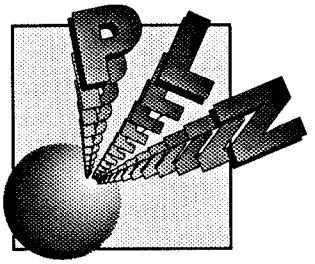
Temp Workers Come to Prison

The warden at the John Lilly Correctional Center in Boley, Oklahoma, has initiated a program of using temporary workers (he calls them "Temp Cops") to save money. The temp cops are off-duty policemen used to supplement the guard staff.

The American labor movement has been hard hit by the use of temp workers in other sectors of the economy. Large businesses like using temp workers because they can get away with paying them less than regular employees and, more importantly, temp workers are subjected to all the hazards of employment with none of the traditional benefits such as pensions, health or medical coverage, insurance, unemployment benefits, etc. In other words, it's another means for capitalists to squeeze the maximum profit out of workers. Because of the workers' temporary nature, it makes collective bargaining by unions and such almost impossible.

The Oklahoma program is touted as a "success" because the temporary guards do not go through the six-week guard training program and cannot earn overtime. It is ironic that many rural communities in the U.S. actively seek prisons as a way to reduce unemployment (prisons have been called "welfare for poor, rural white communities") while the prison trend now may well be to reduce permanent employees and use temp workers.

We would hope that unions representing not just guards but also other government employees take notice of this and take steps to halt this trend before it spreads to all areas of civil government.



Access to Courts Right Explained

Leroy Jenkins is an Illinois state prisoner in Protective Custody (PC). He filed suit claiming the prison policy of denying PC prisoners law library access in person violated his right of access to the court. He also claimed prison law library clerks extorted payments from him in exchange for providing legal assistance to him. The district court granted summary judgment to the defendants.

On appeal the court of appeals for the seventh circuit affirmed the dismissal. The court of appeals gives an extensive discussion of the standard it employs in prisoners' access to the court's cases. It is a two prong test that requires prisoner litigants to show prison officials had failed to assist in preparing and filing meaningful legal papers by providing the prisoner with either adequate law libraries of adequate assistance from persons trained in the law. The second prong requires the prisoner to show some detriment caused by prison officials' conduct resulting in the interruption or delay of pending or contemplated litigation. An exception to the second prong is when a prisoner alleges a "direct, substantial and continuous, rather that a minor and indirect limit on legal materials."

The court defines a "substantial and continuous" limitation entitling a prisoner to relief as "any restriction on counsel or legal materials that completely prevents the prisoner or a person acting on the prisoner's behalf, from performing preliminary legal research." The court admits this a strict standard but that it should resolve the policy concerns raised in legal access cases. The court states it waives the prejudice requirement for the "most egregious legal access claims because a prisoner without any access to materials cannot determine the pleading requirements of his case, including the necessity of pleading prejudice."

The court affirmed dismissal of Jenkins' suit by holding he had failed to prove prison officials had prejudiced him by causing a delay or interruption in his litigation. The court held it could not see how the book policy denying PC prisoners direct access to legal books and extortion caused him to lose his case when he could receive photocopied information directly from the law library. See *Jenkins v. Lane*, 977 F.2d 266 (7th Cir. 1992).

Sundiata Acoli Needs Letters

In 1973 Black Panther members Sundiata Acoli and Assata Shakur were captured after a shootout with New Jersey state troopers. One of their comrades, Zayd Shakur, and a police officer were killed. Now, twenty years later, Sundiata is up for parole (Assata escaped from custody and currently resides in the safety of socialist Cuba). The board has hinted that it intends to give the already 56-year old Sundiata a ten year flop. For Sundiata, who is infected with tuberculosis, that amounts to a death sentence.

Outside readers are urged to write to the parole board demanding that Sundiata be released at his parole hearing. Prisoners should have family members write. The address is:

N.J. Parole Board
CN-862
Trenton, NJ 08625

Send a copy of your letter or petition to: **The Sundiata Acoli Freedom Campaign, P.O. Box 55388, Manhattanville Station, Harlem, NY 10027,** so his attorney will be able to verify to the Board that the letters were sent. This man has suffered enough; he deserves to live out his remaining years with dignity.

Publication Review

Nationalist Struggles

By Ed Mead

You will no more learn the truth about various nationalist struggles going on around the world by merely reading the bourgeois media than you will learn about the realities of this nation's criminal justice system by watching TV news. If you are really interested in knowing both sides of an issue, you must be exposed to both sides. This does not mean a "debate" between liberal and conservative factions of the CIA, which currently passes for objective reporting, but rather a reading of the writings of the oppressed people themselves. One must have more that the illusion of being informed. In order to obtain a better grasp of criminal justice issues in the U.S., for example, you would read not just *Newsweek*, the *Times*, etc., but material like *PLN* as well. Indeed, for a genuine democracy to exist there must first be an informed population.

Because of the relatively large number of papers representing the various nationalist struggles, I will not have the space to list them all in one review. What I will do is break them down into regions, such as the Middle East, Asia, Africa, Latin America, and North America. And then print as many as I can every month or so. I'll start with the Middle East. The following publications help me to better understand what is happening both around the world and here at home. It is my hope that you will find them helpful.

Democratic Palestine is published quarterly with the aim of conveying the political line and thinking of progressive Palestinian and Arab forces. *DP* provides analysis pertinent to the Palestinian liberation struggle, as well as developments on the Arab and international levels. An annual subscription to this magazine can be obtained by sending $16.00 to account number 576057, c/o Katja Alheden, Lovgatan 6A, S-43135, Molndal, Sweden, or writing a bum letter to Democratic Palestine, Box 30192, Damascus, Syria.

Forward is a monthly Palestinian magazine dedicated to "the liberation of land and man." While *Democratic Palestine* is more political in the theoretical sense, a strength that is appealing to me, *Forward* contains more news, especially articles about Palestinian prisoners and exposure of Israeli torture. Annual subscriptions are $30.00 per year from P.O. Box 5092, Damascus, Syria. Prisoners may be able to get a free subscription by writing and expressing a genuine interest in regional affairs.

Middle East Report is a U.S. based publication that comes out bi-monthly (six times per year). It's put out by the Middle East Research & Information Project. *MER* is the least political of the magazines reviewed, perhaps because it's printed here in the heartland of international imperialism. But even if liberal, the articles are well written and often informative. The last issue had articles like "Rethinking Jews and Muslims," and "Yitzhak Rabin and Israel's Death Squads." Subscriptions are $25.00 a year from 1500 Massachusetts Ave., NW, Washington DC 20005.

Challenge is a Tel Aviv-based bi-monthly written by Jews and Arabs for the international community concerned with peace in the Middle East, particularly with a solution to the Palestinian-Israeli conflict. They advocate a two-state solution to this conflict. *Challenge* has articles on Palestinian prisoners, the ongoing land takeovers in the occupied territories, and the effects of the Zionist occupation of Palestinian lands. While this is not a political publication in the sense of *Democratic Palestine*, it's nonetheless a very informative one. A year's subscription is $30.00 from Challenge/Etgar, P.O. Box 1575 Jerusalem Israel.

Al-Fajr is a Jerusalem based Palestinian weekly newspaper that provides hews and analysis of events important to those living in Jerusalem. They also report on the situation in the occupied areas, as well as the conditions experienced by Palestinians being held in Israeli prisons. *Al-Fajr* is not explicitly political, but it is informative. Subscriptions are $40 a year, or a sincere bum letter, to Al-Fajr Palestinian Weekly, 16 Crowell Street, Hempstead, NY 11550.

The Other Israel is a small bi-monthly newsletter published by the Israeli Council for Israeli-Palestinian Peace. *TOI* provides readers with an analysis of news and events taking place in Israel from a more progressive point of view than that provided by the ruling class media outlets. The newsletter is $15 per year for the unemployed and students, and can be obtained from P.O. Box 2542, Holon 58125, Israel.

Kurdistan Report is a monthly magazine that focuses on the Kurdish liberation struggle. Kurdistan occupies parts of Iran, Syria, Iraq, Turkey, and the former Soviet Union. The Kurdish nationalist movement is divided into bourgeois and revolutionary factions. The *Kurdistan Report* represents the latter trend. This is one of the best publications one can get for in depth information on developments taking place in this quickly changing region. For subscription information write to: Kurdistan Solidarity Committee, 44 Ainger Road, London NW3 3AT England.

Criminal Justice Statistics

By Ed Mead

You must have done something terribly wrong in a previous life (or maybe it was this one?), as I am now going to stick you with the task of reading a bunch of the government's criminal justice statistics. What I have for you is information from three recent studies; *Drug Enforcement and Treatment in Prisons, 1990*; the *National Update* from the Bureau of Justice Statistics; and the *National Corrections reporting Program, 1989*. It may not be too bad, though, as when I go through these documents I look at material that's interesting to me, and then share it with you. If you want more details about any of this you should order the study or report yourself. I'll give you the address to write to at the end of this piece.

Drug Use

For example, in the *Drug Enforcement in Prisons, 1990,* I was surprised to learn that in nearly every category, except for cocaine, the prison staff had higher positive rates in their drug tests than did the inmates. For amphetamines prisoners tested at a 1.4% rate, while the staff tested at 3.3% positive. In tests for cocaine convicts were 1.2% positive, while staff was only 1.0% positive. Prisoners were .6% positive for heroine use, while the staff was .9% for that drug. Prisoners were 4.6% for marijuana use, while the staff showed a positive rate of 5.4%. For methamphetamines, prisoners recorded a .6% positive rate, while their captors tested out at a .9% positive rate. The report containing this information collected material from 957 state prisons, 80 federal joints, and 250 community based facilities between July 1, 1989 and June 29, 1990.

The outcome for the first positive drug test of a staff member in state and federal prisons was dismissal in only 36.4% and 35.5% respectively. In other words, according to this study, some 65% of correctional staff found to have tested positive for drug use did not lose their jobs. While 83% of

Continued on next page...

federal joints reported they tested their staff for drugs, 42% of state confinement facilities and 32% of community-based centers checked employees. About 55% of federal prisons tested all staff, as did 30% of state confinement facilities and 19% of community-based facilities.

Correctional Spending

Next we have the Bureau of Justice Statistics *National Update*, which has some interesting figures on justice spending. In fiscal year 1990 federal, state, and local governments spent $74 billion for civil and criminal justice, an increase of 21% since 1988. Three cents (3.3%) of every government dollar spent throughout the nation in 1990 were for justice activities: 1.4% for police protection, 1.1% for corrections, and 0.7% for judicial and legal services. In October 1990, the nation's civil and criminal justice system employed 1.7 million persons, with a total October payroll of almost $4.3 billion.

At all levels, governments are spending a greater proportion of their corrections dollars on institutions rather than probation, parole, and pardon. Since 1979, state government expenditures for prison construction increased 612% in actual dollars; almost twice as fast as spending to operate correctional institutions, which rose 328%. State governments spent 3.9% of their total dollars for corrections, including building and operating institutions and running probation and parole programs.

Admissions & Releases

Next, and probably the least interesting to me, we have the *National Corrections Reporting Program, 1989*. Other than the racial data, I found the materials in the 95-paged document less interesting than the others. The information was collected from 37 states and the District of Columbia, and is based on 324,774 admissions (about four-fifths of all admissions to state prisons in 1989). Whites accounted for 46% of all state prison admissions; blacks, 53%; and other races, primarily American Indians and Asians, 1%. Hispanics of all races made up 17% of all reported prison admissions. Overall, black prisoners received median sentences 6 months longer than whites (48 months compared to 42 months).

When it came to releases for 1989, there were a total of 268,207, or four-fifths of all releases from state joints during that year. The median time served for blacks being released was longer than that for whites for all violent offenses, except for unspecified homicide and other sexual assaults. Of state parolees discharged in 1989, over two-thirds of the whites and over half the blacks had successfully completed parole supervision. Among those who were discharged from supervision, more blacks (36%) that whites (27%) were returned to prison for violating the conditions of parole.

You can obtain copies of any of the above reports from the Bureau of Justice Statistics Clearinghouse, Box 6000, Rockville, MD 20850. What I have provided is only an outline of the information provided in these studies. There is a lot more material, including stuff you may have a use for, that can be obtained by writing for your own copies.

States Must Furnish Equivalent of Jailhouse Lawyers For Filing Prisoner Complaints

On page one of the July 1992 issue of *PLN* (Vol. 3, No. 7) we printed a report on a new ruling that promised to have widespread implications for prison law libraries. That case was *Gluth v. Kangas*, 951 F.2d 1504 (9 Cir. 1992), which held that the constitution "does require that inmates be provided the legal assistance of persons with at least some training in the law." (*ID.* at 1511.) Now another case has just been handed down that extends the principles enunciated in *Gluth* from the Ninth to the Sixth Circuit. Today we will be talking about *Knop v. Johnson*, 977 F.2d 996 (6 Cir. 1992).

This latest access to the courts case by the U.S. Court of Appeals was filed by convicts as a class action suit pursuant to 42 U.S.C. § 1983. While the suit deals with a number of other issues, the substance of the case rests in the following language of the court: "To the extent that inmate writ-writers, or jailhouse lawyers, are not adequately filling the needs of prisoners who claim they are being held unconstitutionally, the state must furnish, at a minimum, the functional equivalent of jailhouse lawyers who are up to the job. This means paralegals - not necessarily individuals who have completed two-year training courses designed for document managers at large corporate law firms, but intelligent lay people who can write coherent English and who have had some modicum of exposure to legal research and to the rudiments of prisoner-rights law." (*Knop* at 1006.)

The court of appeals reversed a district court ruling requiring that such paralegals be independent of the state, saying that if "Michigan wishes to facilitate its prisoners' access to the courts by furnishing assistance through paralegals hired and supervised by the state itself, we think it should be permitted to do so." The appeals court also set limits on the type of litigation convicts had a right to expect assistance with. There is no constitutional right, the court held, to legal assistance on claims involving such things as domestic relations, personal injury, deportation, workers' compensation, social security, detainers, wills and estates, and taxation. (*Knop* at 1008-1009.)

One of the primary aspects of the *Knop* case, at least in terms of future potential, was set out in a footnote (# 5) on page 1004. This dealt with the rights of women prisoners to assistance in drafting their legal pleadings. "Where female prisoners lack their male counterparts' history of self-help in the law," the court said, "...equal protection considerations may require that library facilities be supplemented by assistance from a lawyer." Several citations are cited in support of an expanded level of assistance to women prisoners. Our sisters may want to glean special substance from this case. What is clear is that there's an increasing amount of legal support for the proposition that the states have an affirmative obligation to provide prisoners with access to persons skilled in drafting certain types of complaints. See, *Knop v. Johnson*, 977 F.2d 996 (6 Cir. 1992).

"Distrust," said Nietzsche, "all in whom the impulse to punish is strong." No one is more ferocious in demanding that the murderer "pay" for his crime than the man who has felt strong impulses in the same direction. No one is more condemning of the "loose" woman than the "good" woman who has on occasion guiltily enjoyed some purple dreams herself. It is never he who is without sin who casts the first stone.

Along with the stone, we cast our own sins into the criminal. In this way we relieve our own sense of guilt without actually having to suffer the punishment - a convenient and even pleasant device for it not only relieves of sin, but makes us feel actually virtuous.

Professor Henry Weihofen

Editorial Comments

By Paul Wright

Welcome to another issue of *PLN*. First off everyone at *PLN* would like to thank Steven Mitchell and the folks at Friends of the North Country for their generous donation of $655.00 to *PLN*. To date, this is the biggest lump sum donation we have ever received. We greatly appreciate the kindness and generosity of Steven and FONC. We have been able to continue publishing because of such financial support by our readers and supporters. This contribution will go toward the printing of our 1994 Prisoners' Calendar.

We are still working on the prisoners' calendar. The problem we keep running into is a lack of graphics to go with it (the calendar portion is already done). What we need from our artistically inclined readers out there are black and white, 8½ by 11, horizontal (landscape) drawings, sketches, paintings, etc. that folks won't mind looking at for 30 days at a time. Send us a xerox copy for us to examine and determine if it's appropriate for the calendar; if it is we can then ask for a better copy. If you know of any artists inclined to having their work reproduced let them know about our project. We need to have the calendar done and at the printer by September at the latest in order to have it ready for 1994.

From now on whenever your subscription is within an issue or two of expiring we will send you a postcard letting you know about this. We don't have set donation/subscription rates because a lot of our readers can't afford to make any donations at all due to being on death row, in control units, in Marion, etc. We rely on the donations over and above the bare minimum from our readers who can afford to subsidize the subscriptions of indigent readers. It costs us money to send out the cards but more importantly, valuable time to make and mail the cards, then reactivating expired subscriptions, etc. This is time we can use for more productive things. So if you want to keep getting *PLN* and haven't donated in a while please don't wait until the last minute to send a donation (I'm sure the forces of procrastination will eventually win out, *smile*).

Right now we have about 580 U.S. subscribers and that number slowly continues to grow. What we've noticed is that we don't have many readers in federal prisons outside of Marion. If you're a reader in the BOP please let your fellow prisoners know about *PLN* and encourage them to subscribe, send articles, etc. All of our readers should know we have *PLN* subscription flyers and a *PLN* display ad that is camera ready for publication on request. We have zero money available for advertising like conventional publications do. We prefer to use our limited funds to actually publish *PLN*. Our target audience is pretty narrow: jailhouse lawyers, progressive and politically conscious prisoners and their friends, supporters and loved ones on the outside, and citizens interested in prison struggle and issues of criminal justice policy. To reach these people we need your help, so tell your friends about *PLN*. If you like us and what we do, chances are others will too.

The following people recently sent donations to *PLN*. Due to a computer mix up we know they made a donation and the amount but we don't have their mailing address. Because of this we can't contact them directly. If you know any of these people (or better yet if they're reading this) please have them contact *PLN* and send us their mailing address. The affected people are: Lloyd Johnson, Fay Dowker, Jorge Restripo and Willie Williams.

A separate project I have going is a declaration of support from prisoners for the PCP (Communist Party of Peru) prisoners of war and the revolution in Peru. If you have not received a copy of the statement and are interested in participating please send an SASE to us asking for the statement. Once we have the endorsement we plan to distribute it to the progressive media here in the U.S. and overseas for publication.

Enjoy this issue of *PLN* and remember that we welcome articles, input, suggestions and comments from our readers.

Freedom for Gerhard Bögelein

On May 18, 1992, the 22nd tribunal of the Provincial Court in Bamburg, Germany, condemned Gerhard Bögelein to life in prison without parole; he is 69 years old. The judge's reason: the murder, in 1947, of a former judge of the Nazi army.

This sentence is scandalous for various reasons:

- Gerhard Bögelein was an active combatant and militant in the resistance against German fascism. He was a draft resistor, deserter and joined the Red Army where he continued fighting against fascism.
- Between 1943 and 1945 the assassinated Nazi judge signed between 120 and 170 death sentences and even in 1947 was a committed Nazi.
- Gerhard's trial was based on investigations and questioning of witnesses which were conducted in the early 1950's by a former judge of the Nazi Peoples' Tribunal.
- Almost all of the prosecution's witnesses were unrepentant Nazis.
- Gerhard denies committing the assassination.
- Until the reunification of the two Germanies, Gerhard Bögelein was a citizen of the German Democratic Republic (East Germany); shortly after which he was arrested and forcibly transferred to a prison in Hamburg despite being very ill and not being in sufficient health to withstand imprisonment.

From the arrest and imprisonment of Gerhard Bögelein in December 1990, to the prosecution and sentence against the elderly anti-fascist, are blatant signs of a continuing persecution of the anti-fascist resistance against the Nazi regime. The trial is an example of the falsification of history on the part of the German Federal Republic (the former West Germany) which seeks to convert Nazi criminals into victims and the people who actively resisted fascism into criminals.

We are indignant and scared by this sentence and we make a call on all true democrats and anti-fascists here and outside Germany to intervene in favor of Gerhard Bögelein's immediate release.

Please send letter and petitions to: Prozessgruppe Kielhorn/Bögelein, c/o Projecktgruppe for die vergessen opferdes NS-regimes, Lindenallee 54, W-2000 Hamburg 20, Germany

So far more than 1000 people, groups, and organizations have signed this resolution.

Letter from Exile

by Ray Luc Levasseur

Remember Eugene Debs? One of the first Socialists I ever read, before I moved on to the hard-core. I used to quote him in letters - "where there is a lower class I am of it, where there is a criminal element, I am in it, while there is a soul in prison, I am not free." I don't know if he wrote this before or after his stint in Atlanta, but it always impressed me. Enough so I named a cat after him.

I don't think prisoners and their struggle need to be romanticized, but what phase have we entered when the liberals/left, including that highly suspect group "progressives", make no mention of prisons? They write enough about police and police repression - check that - not enough, but more than about prisons, and then let it die on the vine as if humanity ceases to exist after booking.

I don't think this lack of consciousness problem is so much that predominantly white, middle class leftist/liberals have never experienced prison. It's more a case of their not being personally or politically threatened by it.

They go on and on about Big Brother, civil rights violations, suppression of dissent, etc., but they all go past "go" and collect their $200. They can play monopoly like the rich folks-without the Get Out Of Jail Free card. That wasn't the case in the past.

At the turn of the century through the '20s, radicals, Wobblies, immigrants, union organizers, felt the crunch. Communists and unionists in the '30s. Reds in the '50s. Enough radicals and militants in the '60s-'70s to make people think. Blacks, radical and otherwise, having long been held in the revolving door. And Latinos the last few decades.

Nowhere do you come up against the power of the law and naked force as blatantly as it's wielded in prisons. A virtual slavocracy as embodied in the 13th Amendment to the Constitution. We have barely any rights the State is bound to respect.

If the Left did have any political consciousness about the issue - and some leftists do - they're not likely to act on it because they lack the strength and resources to wage a vigorous struggle. In their publications, Leftists often refer to the risk of imprisonment due to their activities, but I wonder how many would remain active if they seriously thought their actions carried the risk of imprisonment or bodily harm.

Prisoners often mirror-image what is happening in the street. With the exception of "criminal justice" issues, the general level of political consciousness among prisoners is low. They are ripe for new ideas and alternatives, but don't see any. Which is understandable given there is no organized movements presenting any offerings. This is a period of new total abandonment of prisoners. Combine that with the conditions of survival and it tends to breed an unhealthy cynicism.

Many Marion prisoners have been involved in individual and group acts of resistance over the years. For their efforts, they have been subjected to beatings, torture, transfers, isolation, more time - the whole nine yards. They see nothing positive coming out of it other than maintaining their integrity while staring down the worst abuses. They get no support outside and solidarity is lacking inside. Their hopes hinge on one more crack in the street. One more payday or payback, and hell hath no fury like an enraged ex-con.

For five years now, prisoners have been sentenced under the new rule of mandatory sentences with no parole. Young dudes are coming in with big time. You can't do time on the installment plan anymore - the sentences are too steep, with no parole release. You do more than a couple of bits and your whole life is gone. So, the prevailing attitude is next time why show any consideration to cops or witnesses since you're coming back to 20 to 30 after doing 10 to 15. The prevailing informational exchange is based on methods of criminal operation.

So while a totally unsuspecting and scammed soul takes refuge in the fact that 1.2 million women and men are locked away, the next generation is slipping up to their back door, and ex-cons come out of their own frightful situation without a pot to piss in and no prospects.

The reason there was such a high level of political consciousness among prisoners of an earlier era was because they reflected what was happening on the streets of the country at an earlier time, and to a lesser degree, internationally. Prison conditions are such that confrontations and rebellion will continue regardless of the existence of external movements. The lowest common denominator with us, without significant outside support, is how much suffering and bleeding we will endure before we are willing and able to sacrifice even more for a chance to turn the situation around. Or has the current situation become a permanent and expanding part of a larger nightmare we are all getting sucked into?

Source: *The Madison Edge*

Religious Standards Applied

Gary Bear is an Iowa state prisoner. He is part Native American and sought to participate in Native American Religion (NAR) ceremonies at the Iowa Penitentiary, but was prohibited from doing so by the prison's NAR consultant because he did not have a Bureau of Indian Affairs (BIA) enrollment number. (The BIA requires people to be at least 1/4 Native American in order to be enrolled.) Bear filed suit that his banning from NAR ceremonies deprived him of his right to practice his religion, which prison officials had previously allowed him to practice without incident. The district court ordered the defendants to determine Bear's status under a standard set forth in a settlement between Native American prisoners and the Iowa DOC concerning NAR practices. Both sides appealed this ruling and the appeals court initially remanded the case for a determination of mootness. The district court certified the case was not moot. The court of appeals for the eighth circuit vacated and remanded the case.

The court held that the courts are limited from reviewing religious decisions by recognized spiritual leaders. In this type of case (not just prison suits) it was barred from second guessing the doctrinal merits of whether a person is entitled to practice NAR or not. But, it held, the courts are not barred from determining if the NAR consultant's decision was reached in a manner consistent with the terms of the settlement decree in the previous class action suit. The district court had concluded the religious consultant had not followed the process specified in the decree. The court of appeals agreed with this ruling by vacating it because the language used by the district court in its order defining Native Americans was broader than that in the settlement decree which had the effect of unilaterally modifying the settlement in the other case. The appeals court remanded the case for a determination of whether Bear can establish, by a method other than BIA registration, whether or not he is a Native American. See: *Bear v. Nix*, 977 F.2d 1291 (8th Cir. 1992).

Retrial for Damages Alone Appropriate

Tommy Williams is a Missouri state prisoner who was stabbed several times by two other prisoners. Williams filed suit against a guard and several other officials claiming they were deliberately indifferent and acted with reckless disregard to his safety when they knew the prisoners were his enemies and allowed them access to his cell.

The case went to trial and in the first trial the jury found the prison officials liable but did not award any damages. The magistrate judge held the ruling constituted a miscarriage of justice and was inconsistent. The court ordered a second trial solely on the issue of damages. The jury then awarded Williams $300.00 in actual damages sustained from the stabbing and permanent loss of the use of one finger and $500.00 in punitive damages. Based on the jury's first verdict prison officials appealed, claiming that they were entitled to judgment. They also claimed that the magistrate had abused his discretion in granting a new trial solely to determine damages because the jury's findings in the first trial were reconcilable and the issues of damages and liability were so interwoven that the second trial should have included the liability issues.

The court of appeals for the eighth circuit affirmed. The appeals court held there was sufficient evidence to uphold the liability verdict against the defendant.

The court held that the magistrate had correctly determined the jury was confused by the jury instructions which resulted in the inconsistent verdict in the first trial. The defendant guard was not entitled to a new trial on the liability issue because the evidence supported a liability finding and the jury was correctly instructed prior to reaching its verdict. See: *Williams v. Armontrout*, 977 F.2d 437 (8th Cir. 1992).

Damages Awarded in Beating Case

Rickke Greene is an Oklahoma state prisoner. While in a segregation unit Greene was scalded by another prisoner and received second degree burns. After not being treated at the prison infirmary he was returned to his cell, knocked to the floor, kicked and beaten by guards while still handcuffed. At trial one of the guards admitted he had held a knife to Greene's face and threatened to stab him. The guards cut Greene under the eye and nose. Greene was taken back to the infirmary, again beaten and attacked by guards. After his injuries were treated he was returned to his cell which was stripped and his own clothes were taken. Greene filed suit under § 1983 claiming violation of his first, eighth and fourteenth amendment rights. After a bench trial Green was awarded $15,000 in damages. He appealed several lower court rulings.

The tenth circuit court of appeals affirmed in part, reversed in part and remanded the case back to the lower court.

The lower court did not enter injunctive relief against the defendants. The appeals court upheld this but remanded the issue for a hearing to determine if the defendants had prevented Greene from filing a reply brief in the case and, if so, if he had been prejudiced by their actions. The court cautions the prison officials to "limit their behavior within the parameters of plaintiff's constitutional rights."

The court of appeals declined to award punitive damages because Greene "provoked" the defendants by throwing waste at them and being "highly combative."

The court reversed the lower court's dismissal of Greene's access to the court's claims. The appeals court notes that prisoners have a right to petition the courts and prison officials cannot, lawfully, retaliate against prisoners who file, or seek to file, lawsuits. Greene's claims that he was denied law library access and that his legal materials were destroyed stated a cause of action.

The court found that prison officials had intimidated two prison witnesses and thus prevented them from testifying on Greene's behalf at trial. The court remanded this portion of the case so that the lower court could consider statements the witnesses had made to DOC investigators before being intimidated into silence. See: *Greene v. Johnson*, 977 F.2d 1383 (10th Cir. 1992).

APA Partially Applicable to Arizona's DOC

Arizona's Administrative Procedures Act (APA) exempts the Department of Corrections in the formulation of policies that concern only inmates. Brad Wilkinson, a convict at the Tucson Prison Echo Unit, was denied a visit with a religious leader. This was done pursuant to a newly enacted policy on religious visits that the DOC had promulgated without regard for Arizona's APA. Mr. Wilkinson filed suit in state court contending that the new religious visitations policy was void in that it wasn't implemented in accordance with the APA.

The DOC contended that the new religious visitation rule was exempt from the APA pursuant to a statute exempting them from any rule "concerning only inmates of a correctional or detention facility." The court, however, decided "...the DOC's religious visitation rules concern not just the inmates," the court said, "but also the religious leaders who visit them. Accordingly, the rules are not exempt from the formal rule making process of the APA, and until similar rules affecting religious visitation are promulgated lawfully, they are invalid."

Accordingly, it would appear from this case that any challenge to Arizona's regulations for failure to comply with the APA will have to be based on the applicability of such a rule to outside people. See, *Wilkinson v. State*, 838 P.2d 1358 (Ariz. App. Div. 2, 1992).

Letters From Readers

Prison Journalist Punished

[*Editor's Note: Adrian Lomax is a Wisconsin prisoner who frequently contributes articles to* ***PLN****. He also has a regular column in* ***The Madison Edge****, an alternative newspaper in Wisconsin. Adrian focuses on exposing injustice in prison and is an excellent writer. His story below is not unusual; it is typical of the prisoncrats' behavior toward prisoners who write about prison conditions. Adrian's latest misfortunes came about after he wrote about an abusive guard at a prison in Wisconsin for* ***The Edge****. The infraction report Adrian sent with his letter states: "Inmate Lomax was placed into TLU under DOC 303.11 (4b) due to a newspaper article which appeared in* ***The Madison Edge*** *(11//18/92) that encourages disrespect for captain Patricia Garro (WCI). The article encourages inmates to defy the captain's authority and ability to control a particular situation. Because this same article can easily be communicated to other inmates it has the potential for encouraging disrespect and defiance of all staff authority. Possible violations of DOC 303.16 Threats, 303.271 Lying About Staff."*]

Continued on back page...

The fun never ends. As you can see I'm in segregation. Guess they keep didn't like my last column in *The Edge*. The could just keep me in TLU for 21 days and release me without ever giving me a conduct report (I do not have CR at this point). They've done that shit to me before, numerous times. Or they could ram through a bogus CR and sentence me to long term segregation. That lying about staff charge carries 360 days.

Of course, there are big first amendment issues here. I've already filed a lawsuit and asked for a TRO requiring my immediate release from seg.

The library will send over no law books. They will only send over photocopies of cases (loaners) on an exact cite basis. They will only send two cases at once and won't send more until you return the previous two. There is a 48 hour turn-around so the bottom line is that I can see four cases a week. There is a satellite library in the seg unit but it doesn't have much. And get this. One must wear handcuffs and a waist chain while using the seg library. You can't hardly even pull a book off the shelf, much less read it. And if you do get a book off the shelf, don't drop it on the floor because it's staying there. But here's the best part. They only let us have pens for two hours a day, pass 'em out at 7 P.M. and pick 'em up at nine. Refuse to give a pen back? Why riot gear and mace, of course. We can have pencils all the time but try to get a guard to sharpen one for you. So guys over here perfect the art of sharpening pencils with their thumbnails.

I'm sure the prison officials love the beauty of locking me up in seg for writing an article, then denying me the use of a pen.

Adrian Lomax, PO Box 900, Sturtevant, WI 53177

[*Editor's Note: as we go to press Adrian has informed us he has been infracted, found guilty, and sentenced to 368 days solitary confinement.*]

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Supreme Court Strikes Blow against Attorney Fees

By Adrian Lomax

Since 1976, the Civil Rights Attorney Fees Award Act, 42 U.S.C. § 1988, has ensured that state officials would be forced to pay the attorney fees of the litigants who successfully sue state officials for violations of federal rights. This law has been especially important to prisoners for two reasons.

First, few prisoners have the resources to hire attorneys. The promise of an award of attorney fees from the state treasury is one of the few incentives attorneys have to become involved in prisoner litigation.

Second, judges and juries tend to place a low dollar value on the deprivation of prisoners' rights. Even when a court rules that prison officials have violated a convict's constitutional rights, the prisoner often obtains only a small monetary judgment. The amount of damages likely to be awarded to prisoners whose rights have been violated won't deter prison officials from future lawless conduct. But the possibility of an award of attorney fees ranging in the hundreds of thousands of dollars is far more likely to make the keepers respect prisoners' rights.

The U.S. Supreme Court has now struck a serious blow to the Attorney Fees Act as it applies to many prison cases. Joseph Farrar, the owner of a private school in Texas, filed suit in federal court against several state officials. After twelve years of litigation, Farrar succeeded in obtaining a judgment that the Lieutenant Governor of Texas had violated his constitutional rights. However, the court awarded Farrar only one dollar in damages.

Because he had prevailed in the lawsuit, albeit obtaining minimal damages, Farrar moved for an award of attorney fees. The Federal district court awarded Farrar $317,000 in attorney fees, costs, and prejudgment interest. Texas officials appealed, and the Supreme Court, in a 5-4 split, struck down the award. *Farrar v. Hobby, S. Ct., 52 CrL 2045 (1992).*

The Court found that a plaintiff who obtains an award of damages even in the amount of only one dollar is a "prevailing party" for purposes of the Attorney Fees Act. "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay," the court said.

Nonetheless, the majority opinion, written by Clarence (Uncle) Thomas decided that no attorney fee award was justified in this case. "The most critical factor in determining the reasonableness of a fee award is the degree of success obtained," Thomas wrote. Observing that Farrar's litigation accomplished little beyond giving Farrar moral satisfaction, the majority opinion said that, "In some circumstances, even a plaintiff who formally 'prevails' under § 1988 should receive no attorney's fees at all." In a sentence that will send a chill down the spine of every prisoners' rights attorney, the decision declared: "When a plaintiff recovers only nominal damages..., the only reasonable (attorney's) fee is usually no fee at all."

This ominous decision is likely to haunt prisoner litigants for years to come. Prisoners who obtain only small monetary damage awards will be deprived of attorney fees as well. It has always been hard to interest attorneys in taking on lawsuits against prison officials. The Supreme Court just made it a lot harder.

Federal Judge says Prisoners Denied Access to Courts

Prisoners in Arizona have been denied adequate means to communicate with lawyers, perform legal research, and otherwise receive legal assistance, according to a recent decision by United States District Judge Carl Muecke in Phoenix, AZ.

Ruling in *Casey v. Lewis*, a class action lawsuit brought on behalf of all Arizona prisoners, Muecke wrote that the Department of Corrections' system for allowing prisoners access to the courts "fails to comply with constitutional standards."

"It's an important victory for the Constitution," said Stuart H. Adams, Jr., a lawyer with the National Prison Project of the American Civil Liberties Union in Washington, D.C., which represents the prisoners. "The right to petition the courts is in many ways the most basic and important right prisoners have." In a 36-page opinion, Muecke found that prison officials failed to provide adequate legal assistance to prisoners in segregated housing, and to those who are illiterate or do not speak English; failed to provide confidential photocopying services for prisoners' legal documents; and arbitrarily denied prisoners confidential telephone calls with their attorneys. Muecke added that he will appoint a Special Master to work with lawyers on both sides of the lawsuit in developing an order to remedy these deficiencies.

In an earlier lawsuit involving only the Central Unit at the Arizona State Prison at Florence, Muecke ordered prison officials to provide training for inmate legal assistants, to allow prisoners a reasonable amount of time in the prison law library, and to provide basic legal supplies, such as pens and paper, to indigent prisoners. That decision, *Gluth v. Kangas*, was unanimously affirmed by the U.S. Court of Appeals for the Ninth Circuit in July 1991. In his ruling in *Casey*, Muecke stated that he would now order that the Gluth policies be implemented throughout the Arizona prison system.

Casey v. Lewis was filed in January of 1990, and the trial took place before Muecke between November 1991 and February 1992. The prisoners are represented by the National Prison Project and by Alice L. Bendheim, a Phoenix attorney. The lawsuit also alleges inadequate medical and mental health care, failure to provide for the special needs of handicapped prisoners, and assignment of prisoners to segregation based on unreliable confidential information. Muecke is expected to decide these issues before the end of the year.

Congress OKs Fed Cons To Pay Cost of Prison

Congress has approved legislation allowing the Federal Bureau of Prisons to collect "user fees" from federal inmates equal to the costs of a year's incarceration. The Justice Department, which sought the legislation, estimated that about 9 percent of the 30,000 new inmates who enter the prison system each year will be able to pay their cost of incarceration, at least for the first year. Thus, the department said, it may raise up to $48 million a year by forcing inmates to pay for their incarceration.

The provision was signed into law last October as part of the Justice Department's Fiscal Year 1993 appropriations bill. The bill provides that the Attorney General may assess a fee equal to the cost of one year of incarceration (currently estimated at $17,000 to $20,000 per inmate). If an inmate serves 11 months or less, the fee is to be reduced proportionally.

The attorney general was granted discretion to waive or reduce the fee for any inmate who is unable to pay, even under an installment schedule, or in cases where the fee "would unduly burden the defendant's dependents."

Congress specified that any money collected under the inmate user fee program in the current fiscal year be placed in the general U.S. Treasury fund. But starting in Fiscal Year 1994, the funds are to be deposited in the federal prison system's "salaries and expenses" account.

During Congressional hearing on the proposal held last year, Rep. Joseph Early, a Massachusetts Democrat who serves on the Appropriations subcommittee with jurisdiction over the federal prison system, acknowledged the political appeal of the inmate fee proposal, but questioned its practicality. "It's going to be an easy thing to pass," he said. "I don't know who is going to vote against it. But would it allow you to assess assets of the individual being incarcerated?"

Bureau of Prisons Director J. Michael Quinlan said the details would be worked out in regulations, with authority delegated to each institution's warden to decide whether a given prisoner could pay such a fee. But he noted that the Bureau of Prisons already collects $13 million a year in fines that courts have imposed on prisoners to repay victims, make restitution, or pay alimony. The bureau uses a "carrot-and-stick" to get inmates to cooperate in paying fines, he said, with bargaining chips such as work assignments and preferred housing.

Federal courts already have the authority to impose a prison-related fine during the regular sentencing process, but most judges have not been using that authority, Mr. Quinlan said. The new law carries a stipulation that the Attorney General may not impose a "user fee" on any inmate who already was fined by a judge under those similar provisions.

From: *Criminal Justice Newsletter*

Federal Prison Terms Increasing

Offenders sentenced under the Federal Sentencing Guidelines are more likely to go to prison and to stay there longer than were offenders sentenced for crimes committed before the guidelines took effect in November, 1987,according to U.S. Justice Departments Bureau of Justice Statistics (BJS). BJS said that in 1990 about 74 percent of the defendants sentenced under the Sentencing Reform Act of 1984 were sent to prison, compared to about 52 percent of the pre-guideline defendants sentenced in 1986.

"The advent of Federal Sentencing Guidelines has accompanied a substantial increase in the probability of imprisonment for a large number of crimes," commented BJS Director Steven Dillingham. "In 1986 about 77 percent of those convicted of drug crimes received prison terms. By 1990 approximately 89 percent of drug offenders sentenced under the guidelines received prison terms."

Although the Sentencing Reform Act abolished release from prison by a parole board decision, the Sentencing Commission enabled judges to sentence offenders to prison terms followed by a specific period of post release supervision. During the first six months of 1990 about 69 percent of the offenders sentenced under the guidelines were given post release supervision terms averaging 42 months. Copies of the report, *Federal Sentencing in Transition*, are available from The Bureau of Justice Statistics Clearinghouse, Box 6000, Rockville, MD 20850. Phone 1-800-732-3277.

Freezing Temperature Violates Eighth Amendment

Four prisoners at the Iowa State Reformatory segregation unit were sent outdoors to a recreation area while prison guards searched their living unit for weapons. The temperature was sub-freezing with a significant wind chill factor. The prisoners requested not to go outside. They were placed outdoors with only coats even though hats and gloves were available in the immediate area. They were held in these conditions for between one hour and one hour and forty five minutes. The prisoners filed suit claiming their eighth amendment rights had been violated. The district court agreed and ruled in their favor, awarding each prisoner $75.00 in damages plus costs.

Prison officials appealed and the Court of Appeals for the Eighth Circuit affirmed the lower court in its entirety. The appeals court held the district court's findings were not erroneous and that the prisoners had been subjected to an extreme deprivation which denied them "the minimal civilized measure of life's necessities." See: *Gordon v. Faber*, 973 F.2d 686 (8th Cir. 1992).

Okay to Steal Mail

Two Missouri state prisoners wrote and telephoned US postal officials to complain that prison administrators were "stealing, holding, tampering with, censoring, delaying and destroying" their mail in violation of federal postal laws. The postal officials refused to investigate the prisoners' claims. The prisoners then filed suit against the officials claiming they had been discriminated against by the postal officials' refusal to investigate their complaints because they were prisoners. The district court dismissed the suit for failure to state a claim.

On appeal the Eighth Circuit Court of Appeals affirmed dismissal. It held that citizens in general have no right for law enforcement officials to investigate their complaints of wrongdoing or criminal activity.

The prisoners failed to state an equal protection claim because prisoners are not similarly situated to non-prisoners. Thus, the court held, postal officials do not need to handle their complaints like those of free citizens. In essence, this ruling gives prison officials a free hand in stealing, destroying, delaying, and tampering with prisoners' mail in the full knowledge they will not be investigated or held accountable by the postal employees charged with safeguarding the mails. See: *Scher v. Chief Postal Inspector*, 973 F.2d 682 (8th Cir. 1992).

Court Cannot Supply Elements Of Complaint

Joseph Pena is a prisoner at the Washington State Penitentiary. He was subjected to a digital rectal search without probable cause and filed suit under § 1983. Prison officials sought dismissal of the complaint on grounds Pena had failed to state a claim and that they were entitled to qualified and eleventh amendment immunity. The district court stayed proceedings in this case pending the outcome of a related case, *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988). After the court in *Tribble* denied Washington prison officials qualified immunity on the subject of digital rectal searches, the court denied the official's motion to dismiss in this case. The defendants appealed.

The Court of Appeals for the Ninth Circuit vacated and remanded the case. The appeals court held that Pena's complaint, lacking the facts from the *Tribble* case, does not contain sufficient facts to state a claim under § 1983. Without sufficient facts to support the claim it is premature to consider questions of qualified and eleventh amendment immunity and how pendent state law claims should be treated. The appeals court remanded the case back to the lower court with instructions to dismiss it and allow Pena an opportunity to amend the complaint and refile it.

The court discusses offensive collateral estoppel. The district court had ruled that because the defendants had litigated, and lost, their qualified immunity defense in *Tribble* they were barred from raising it in this case. The appeals court disagreed and lists the four occasions collateral estoppel can be used by plaintiffs to prevent defendants from raising certain defenses. In this case the appeals court held it was improper to bar the defendants from raising a qualified immunity defense because Pena had not alleged the same facts as *Tribble* and the record in this case was insufficient to make such a determination.

The court also discusses eleventh amendment immunity and notes it only bars suits against state officials in their official capacities but not in their individual capacities. It analyzes recent Supreme Court rulings in this area.

Pena also raised pendent state law claims which the defendants sought to dismiss and the district court declined to do so. In their appeal prison officials claimed that the eleventh amendment bans individual capacity claims against officials alleged to have violated state law. The court of appeals held this argument was meritless and the eleventh amendment does not bar suits seeking damages against state officials who violate state law or commit common law torts in the course of their employment. See: *Pena v. Gardner*, 976 F.2d 469 (9th Cir. 1992).

Court Cannot Dismiss Suit if Partial Filing Fee Paid

Autry Clark is an Ohio state prisoner. He filed suit against Ocean Brand Tuna claiming he bought cans of cat food from the prison commissary that had been re-labelled as tuna fit for human consumption. Clark became ill after eating the tuna. He filed suit in federal court claiming the company had violated his eighth amendment rights, the Fair Packaging and Labelling Act (15 U.S.C. § 1451-1461), and various state laws.

The district court granted Clark *In Forma Pauperis* status but required him to pay a $55 partial filing fee. Clark paid the fee and three weeks later the court dismissed the suit *Sua Sponte* (on its own) as being frivolous. The court acknowledged jurisdiction under the diversity of citizenship rule. The court held that private parties can't violate the eighth amendment and that neither Ohio state laws nor the Fair Packaging Act provide a private cause of action. Summonses were never issued to the defendants.

Clark appealed and the Court of Appeals for the Sixth Circuit reversed and remanded.

The Court of Appeals joined four other circuit courts in holding that a district court can't dismiss a suit as being frivolous, *sua sponte*, after the plaintiff has paid a partial filing fee.

As soon as a plaintiff pays the partial filing fee the district court must issue summonses to the defendants. In the event the complaint is deficient the court must give the plaintiff an opportunity to amend the complaint before dismissing it. If the suit is frivolous to begin with the court can dismiss it without requiring payment of any filing fees. See: *Clark v. Ocean Brand Tuna*, 974 F.2d 48 (6th Cir. 1992).

Prisoners No Longer Entitled to Witness Fee's

In October of 1992 former President Bush signed bill HR-2324 into law which prohibits the payment to incarcerated persons of witness fee's in federal court. The law amends 28 U.S.C. § 1821 and overrules the US Supreme Courts decision in *Demarest v. Manspeaker*, 498 US 184 (1991), which had held that prisoners were entitled to witness fees under § 1821.

In the March, 1992, (Vol. 3, No. 3) issue of *PLN* Bill Dunne wrote an article titled "Protection of the Law". In his article Bill pointed out how clear the statute's language was that prisoners be paid witness fees; so clear that a unanimous Supreme Court affirmed it. Bill reported the details of the U.S. Attorneys and Marshalls charged with making the witness payments who had declined to do so despite the Supreme Court's ruling.

It appears that even after the Supreme Court ruling affirming that prisoners are indeed supposed to be paid witness fees no prisoner was ever actually paid the $30 he/she was entitled to. It is appropriate to quote Bill's article: "The rule of U.S. Law is once again shown to be the rule of the gun. Prisoners have no hired guns of either the Marshall sort or the suit sort who pay for and influence congress to refrain from resolutions injurious to their interests. Power in this society is predicated on the wealth to hire such guns, and prisoners are among society's most impoverished segment. Hence, they get only as much democracy as the wealthy feel necessary to maintain appearances."

Death Threats and "Snitch Jacketing" by Guards Unlawful

Craig Northington is a Colorado state prisoner assigned to community placement. While going to his work site plainclothes prison officials surprised him, put guns to his head without identifying themselves as prison guards, threatened to kill him and verbally and physically assaulted him while returning him to the local jail. Northington claims one of the guards told other prisoners he was a "snitch" and because of this he was severely beaten by a group of prisoners. Northington filed suit under § 1983 claiming violation of his civil rights and a conspiracy to deprive him of his civil rights. The district court dismissed the suit for failure to state a claim.

Continued on next page...

The Court of Appeals for the Tenth Circuit affirmed dismissal of the conspiracy claims but reversed and remanded the excessive force claims for trial.

The court held that prison guards putting a gun to Northington's head and threatening to kill him constitutes excessive use of force. The court notes prisoners "have a constitutional right to be free from the terror of instant and unexpected death at the hands of their keepers." Such threats constitute a psychological injury actionable under the eighth amendment.

The court also held that "snitch jacketing" by guards is unconstitutional; that when guards incite prisoners to harm another prisoner, it is as if the guards themselves had inflicted the beating as punishment. Thus, it violates the eighth amendment. See: *Northington v. Jackson*, 973 F.2d 1518 (10th Cir. 1992).

Prison Bosses Liable for Rights Violation

Willie Horne is a retarded New York state prisoner who was infracted, not provided with a counsel substitute at a disciplinary hearing, and was punished. Horne filed suit claiming that prison officials violated his due process rights by subjecting him to a disciplinary hearing without a counsel substitute when they knew he has an IQ of 58 and is functionally illiterate. The New York DOC Commissioner and prison warden moved for summary judgement claiming they were entitled to dismissal from the suit based on their lack of personal involvement. The district court denied their motion.

The court ruled that because New York state statutes require the DOC commissioner to promulgate disciplinary regulations, he was sufficiently involved in the case to be held liable under § 1983.

The court held the warden could be liable under § 1983 because he was aware of Horne's retarded condition, knew of the disciplinary hearing, and took no steps to correct the constitutional problem. See: *Horne v. Coughlin*, 795 F. Supp. 72 (ND NY 1991).

Maxed Out Washington Cons Have Right To Earn Good Time

This is a case that will only be of interest to prisoners in Washington state, as our system of issuing good time credits is probably the strangest in the nation. This case deals with a Washington state prisoner who filed a personal restraint petition seeking review of a decision of the Indeterminate Sentencing Review Board ("ISRB" or "parole board") setting his new minimum term at his maximum expiration date. The prisoner contended that the board's action amounted to a determination of parolability and thus, under the applicable rules, he was entitled to advanced notice and an in-person hearing. Division One of the State Court of Appeals agreed with him and granted the petition.

The prisoner, Charles Cashaw, contended that the Board erred in extending his minimum term to the maximum expiration date, in that the decision effectively denied him the ability to earn good time credit while he serves his new minimum term in prison. Since he has a statutory right to earn good time credit under RCW 9.95.070, and the prison superintendent recommended that he receive such credit, the board's decision not to consider him for parole prior to the expiration of his maximum is tantamount to a holding requiring him to forfeit his good time credits, earned or to be earned in the future, and is therefore a violation of his right to due process. Cashaw claimed that he was entitled to an in-person hearing before the parole board pursuant to RCW 9.95.070 and RCW 9.95.080.

There was a good deal of discussion by the court as it tried to rationalize this state's irrational system of crediting good time. Prisoners should study the exact language contained in the court's ruling to learn more, but in essence the court said: "Cashaw never had a realistic opportunity to respond to charges that he was not parolable at the administrative review conducted [by the board]. Accordingly, Cashaw did not receive all of the process due him." It will take much additional litigation to make Washington's good time laws for pre-SRA offenders anything approaching fair. Yet this ruling was a small step in the right direction. See, *In Re Cashaw*, 839 P.2d 332, 68 Wa. App. 112 (Wash. App. Div. I, 1992).

Penn. Senate Warned of Possible Prison TB Epidemic

Tuberculosis may spread from state prisons and become Pennsylvania's number one health concern if officials fail to implement proper controls, a witness told a state Senate committee last November in Harrisburg.

ACLU lawyer Stephan Presser said the recent discovery that nearly one-quarter of the inmates at Graterford Prison in Philadelphia tested positive for TB is a serious threat to public safety. There are 4,100 men at Graterford. Some 966 prisoners, or 23 percent of the population, tested positive on PPD skin tests during three days of testing. "No other prison has ever turned up such a rate of TB," he said.

A corrections Department spokesman Ben Livingood called Presser's comments "inflammatory rhetoric," and that there was no cause for alarm. Another prison spokesperson, Alan LeFebvre, said information from the Centers for Disease Control Prevention in Atlanta shows that on average, between 18 and 23 percent of prison inmates in the country will test positive in skin tests for TB. "The bottom line," LeFebvre said, is that "we haven't come up with anyone with tuberculosis."

From: *Corrections Digest*

Dismissal of HIV+ Conditions Suit Reversed

Two HIV+ Mississippi state prisoners filed suit against Mississippi state officials challenging numerous aspects of the state DOC's policy regarding HIV+ prisoners. The policies they challenged include: placing HIV+ prisoners in administrative segregation and denying them all privileges; not providing adequate AIDS treatment (to include medication) and diagnosis; a lack of doctors trained to treat HIV+ medical problems; prison dentist's refusal to treat HIV+ prisoners; that HIV+ prisoners were denied privileges and were placed in housing substantially inferior to that of other prisoners which were vermin and insect infested, had defective plumbing and were deteriorating; that publishing their medical status violated their privacy rights, and that some HIV+ prisoners remained in the general population. The district court dismissed the entire suit as being frivolous.

On appeal the Court of Appeals for the Fifth Circuit reversed and remanded the case. The court provides a detailed discussion of the difference between legal and factual frivolousness and distinguishes between dismissals under Fed.R.Civ.P. 12 (b) (6) and 28 U.S.C. § 1915 (d).

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The court affirmed dismissal of the claims concerning the identification and segregation of HIV+ prisoners. The court also states the claims on loss of privacy and denial of privileges are without merit.

The court reversed the lower court on the remaining claims. It notes that to find an eighth amendment violation of deliberate indifference to prisoners medical needs or conditions, no "smoking gun" is required and a combination of conditions may violate the eighth amendment even if alone they do not.

The court notes the serious constitutional issues raised in this lawsuit and the developing area of law regarding AIDS related issues in prison and jails. Because of this and the complexity of the issues raised and the need for extensive resources to properly investigate and litigate the claims the court instructs the lower court to promptly appoint counsel to represent the prisoners. See: *Moore v. Mabus*, 976 F.2d 268 (5th Cir. 1992).

Washington Smoking Suit Dismissed

Ronald Guilmet is a Washington state prisoner at Walla Walla. Guilmet does not smoke and a smoker was placed in his cell. Five days later Guilmet complained to the unit sergeant that cigarette smoke bothered him. About five days after this Guilmet was assigned a non-smoking cellmate. Guilmet filed suit claiming that his eighth amendment rights had been violated by his exposure to Environmental Tobacco Smoke (ETS). District Judge Van Sickle granted the defendant's motion for summary judgement and dismissed the suit.

The court held that because Guilmet was moved in with a non-smoker within ten days of complaining about his cellmate's smoking, no eighth amendment violation had occured, as a short delay does not show deliberate indifference to a prisoner's medical needs. The court implies that had prison officials delayed moving Guilmet longer the outcome of this case would have been different. See: *Guilmet v. Knight*, 792 F. Supp. 93 (ED WA 1992).

Exposure to Tobacco Smoke Violates Eight Amendment

Two non-smoking Tennessee prisoners suffering from various medical problems were forcibly celled with prisoners who smoked. They claim the Environmental Tobacco Smoke (ETS) of their cellmates aggravated their existing medical conditions. They filed suit in district court under § 1983 claiming prison officials had violated their eighth amendment rights by double celling them with smokers. The district court dismissed the suit.

On appeal, the Sixth Circuit Court of Appeals reversed and remanded. The court agreed with the four other circuit courts who have held that compelling non-smokers with serious medical needs to share a cell with a smoker violates the eighth amendment.

The Supreme Court has held that denial of adequate medical care to prisoners violate the eighth amendment. The court of appeals held: "Medical consequences of tobacco smoke do not differ from other medical problems. Prisoners allergic to the components of tobacco smoke, or who can attribute their serious medical conditions to smoke are entitled to appropriate medical treatment. Which may include removal from places where smoke hovers."

The court remanded the case back to the lower court for a factual determination of whether the impact of tobacco smoke on the plaintiffs was serious enough to cause an eighth amendment violation. See: *Hunt v. Reynolds*, 974 F.2d 734 (6th Cir. 1992).

PLN readers contemplating litigation on this issue should be aware that the U.S. Supreme Court has granted certiori to *McKinney v. Anderson*, 959 F.2d 853 (9th Cir. 1992), sub nom *Helling v. Anderson*, 112 S.Ct. 2024 (1992). It is a case out of Nevada where a non-smoker was celled with a heavy smoker. The Ninth Circuit ruled in the prisoner's favor. The Supreme Court will therefore decide whether or not forced exposure to ETS violates the eighth amendment. A decision should be issued by July of 1993. *PLN* will report the case whichever way it goes.

Vermont Ends Smoking Ban

The Nov. 26, 1992, edition of the *Seattle Times* reports that the Vermont DOC has ended its ban on prisoner smoking. The Vermont DOC had banned smoking, in July 92, to counter indoor air pollution problems and avoid lawsuits by non smoking prisoners.

The reason given by prison officials for ending the ban was that it had created a thriving black market with a pack of cigarettes costing $40 and individual cigarettes going for $3. Those without money to buy them allegedly use "threats and violence to get them, while others reportedly traded sexual favors or prescription drugs for a smoke."

Prison guards, also forbidden to smoke inside the prisons, were allegedly the primary source of contraband. Dave Eaton, a Vermont prisoner, said the ban had increased the stress factor in prison and reported some smokers were so desperate for a smoke they were smoking coffee and tang. Vermont prisoners will now be able to smoke outdoors in designated areas.

Right to Avoid Tobacco Smoke Exposure not Established

In part of the continuing split among the circuits on this issue, some circuits have held exposing prisoners to Environmental Tobacco Smoke (ETS) violates the eighth amendment, see: *Hunt v. Reynolds*, above. Other Circuits have held it does not. See: *Wilson v. Lynaugh*, 878 F.2d 846 (5th Cir. 1989). The Eighth Circuit has taken a middle course.

In this case, a Missouri prisoner filed suit claiming his eighth amendment rights had been violated when he was involuntarily exposed to ETS and "an audio assault of degrading filth and violence that promotes murder, suicide and satanic practices" from TV's and radios played by other prisoners. The district court dismissed the ETS claim by holding the prison warden was entitled to qualified immunity because there was no clearly established right for prisoners to be free from ETS exposure in 1989 when the incident occurred. The court dismissed the noise claim by holding prisoners have no clearly established right not to be exposed to speech that is offensive to them.

The Court of Appeals for the Eighth Circuit affirmed the lower court. It found the noise claim to be meritless.They assumed, without deciding, that involuntary ETS exposure can state a constitutional claim. But it upheld the district court's ruling that such a right was not clearly established in 1989. See: *Murphy v. Dowd*, 975 F.2d 435 (8th Cir. 1992).

Prisoners Win Suit Over Circulating Petition

Dennis Wolfel and three other Ohio state prisoners, including longtime *PLN* supporter John Perotti, were infracted and disciplined for circulating a petition complaining of brutal prison conditions. The petition was going to be sent to Amnesty International, the international human rights group, to request an investigation of prison conditions in Ohio. The prisoners filed suit under § 1983 claiming prison officials had violated their right to due process by not providing them advance notice of what constituted prohibited activity and for abridging their right to seek redress of grievances. The district court ruled that the prisoners' rights had been violated but that they were not entitled to money damages. The court ordered expungement of the infraction records and awarded enhanced attorney fees to the prisoners' lawyer.

Both sides appealed and the Sixth Circuit Court of Appeals affirmed the district court in all respects except the ruling providing enhanced attorney fees, which they reversed and remanded for recomputation.

The court of appeals held that prison officials may constitutionally prohibit prisoners from circulating petitions. However, in this case the fact that no prison rule specifically banned petitions and that such activity had been tolerated in the past resulted in the court finding the Ohio prison rules unconstitutionally vague.

The court also held that the eleventh amendment does not bar the expungement of disciplinary records. Such injunctions merely prevent the prison system from considering unconstitutional punishments in future decisions made about the prisoner.

The court of appeals held that the prison officials were entitled to qualified immunity from money damages because the prisoners' rights were not clearly established. See: *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992).

Indiana DOC Must Allow Witnesses at Hearings

Jerry Forbes is an Indiana state prisoner who refused to take a urine test because the prison did not publish its testing procedures. He was infracted and requested prison officials as witnesses at his hearing and they refused to appear. He was found guilty, lost good time credits and was placed in segregation. He filed a writ of habeas corpus in federal court which was denied.

Forbes appealed and the Court of Appeals for the Seventh Circuit affirmed denial of the writ of habeas corpus, but held that the Indiana DOC rule that permits witnesses requested at disciplinary hearings not to appear violates both Indiana statutes and the fourteenth amendment to the US Constitution.

An interesting fact in this case is that Forbes filed a writ of habeas corpus directly in federal court. He did so because the Indiana Supreme Court has held that Indiana state courts lack jurisdiction to review decisions by prison disciplinary boards. Thus, Forbes had no state remedies to exhaust. Forbes argued that the fourteenth amendment requires the states to provide a judicial forum for prisoners' constitutional claims. The court notes the Supreme Court has never ruled on this issue and Seventh Circuit precedent does not require a state forum. In any case, the claims can be raised, as Forbes did, in federal court.

The court gives an extensive discussion, with numerous citations, on the reasonableness of urine tests in prison and concludes that the test, as given to Forbes in this case, was reasonable.

While affirming the denial of the writ of habeas on the grounds Forbes was not prejudiced at his hearing, the court went on to hold that Indiana DOC rules which allow witnesses to refuse to appear without explanation violates the due process clause. It is unconstitutional because it places unreviewable discretion in the hands of prisoners and prison officials who may have played significant roles in the prisoners' disciplinary charge and punishment. The court urged the DOC to enact a new rule consistent with Indiana law and the court's ruling.

The court gives a lengthy discussion, with ample citations, on the subjects of adequate disciplinary hearings, the right to call witnesses at such hearings and the right to a meaningful administrative review of disciplinary board decisions. See: *Forbes v. Triqq*, 976 F.2d 308 (7th Cir. 1992)

Prisoner Entitled to Religious Diet

Warren Bass is a New York state prisoner who filed suit under § 1983 after being denied a diet of meals prepared in accordance with his religious beliefs. The defendant prison officials moved for summary judgement on the basis of qualified immunity from money damages. The district court denied their motion and they appealed. In a very brief opinion the Court of Appeals for the Second Circuit affirmed the lower court ruling.

The appeals court notes that prison officials must provide prisoners with diets consistent with their religious beliefs. This right was established in the Second Circuit in *Kahane v. Carlson*, 527 F.2d 492 (2nd Cir. 1975) and has never been overruled and remains the law.

Prison officials tried to argue that US Supreme Court decisions in *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct 2400 (1987), and *Turner v. Safely*, 482 US 78, 107 S.Ct 2254 (1987), had placed doubt on the Kahane ruling. The appeals court quickly dismissed that theory. See: *Bass v. Coughlin*, 976 F.2d 98 (2nd Cir. 1992).

Kentucky Cons Used As Scabs

Prisoners from a privately-run jail in Louisville, Kentucky have been used as scabs in the three-month-old strike by UFCW Local 227 against Fischer Packing Company. The prisoners were brought into the plant after the strikers rejected the company's "best and final offer" by a margin of 402 to 2. Fischer is demanding large concessions.

According to the *Louisville Courier-Journal*, "a private jail...has been supplying county work-release inmates to a temporary employment agency that has used them as strikebreakers at Fischer Packing." The union has objected to the county government, but so far the inmates are still working in the plant.

Local 227 has called for a boycott of Fischer products. The union asks that Kentucky-area supporters buy Ocar Mayer or Wilson products instead. The local has set up a community support coalition of churches, unions, and other organizations to solicit boycott pledge cards from consumers. In addition, unions in the area have 'adopted' supermarkets, taking responsibility for leafletting the different stores about the boycott.

Editorial Comments

By Ed Mead

Why do you think Paul and I go through all the trouble to put out this paper each month? Why do our outside volunteers so consistently work to produce and mail every issue? It certainly isn't because we or our volunteers have nothing better to do with our time. The fact of the matter is that we have a collective message we are trying to get across to the public.

The message is that the current punishment approach to crime does not work, and actually makes things worse; that the public is being ripped off by the state, at the expense of the community's safety. Some who have read our "message" ask why we don't try to raise money for a full-page advertisement in a major newspaper, so we can reach more people? Our response is that we aren't out to reach a lot of people, but rather to reach those most likely involved in the process of moving things forward. To put it another way, we are after quality rather than quantity. That has been until now, and will continue to be, our approach with this paper. Yet the results we had hoped for over the years have not been forthcoming. Our readers aren't doing enough to communicate the message to a wider audience.

PLN is a different kind of publication. We are not doing this newsletter for the purpose of providing you with a reading experience that simply washes over you each month. Use the legal information we provide you with, and marvel at the prison news you would not otherwise be getting. All of that is fine, but what we want is for you to become actively involved in the process of public education. This can be as little as increasing the number of *PLN* readers, or as extensive as getting other media outlets to examine the claims being made by the *PLN* regarding criminal justice policies.

If you feel that we are wrong in what we are doing, or you think we should have a different approach, then let us know. We will print your discussion in our letters section, so others can respond, and we can get a good debate going. The point I am trying to make here is that things aren't going to change unless you, dear reader, get personally involved. And if you are not on some level doing that, then you ought to at least justify your inactivity and silence. If the fault is ours, we want to know about it. If it's yours, then we would humbly suggest that it is time for you to take some responsibility for how bad things are.

It is the end of January as I write these comments, and I have just been reading about a couple of cases that have been handed down by the U.S. Supreme Court. One of these, which deals with whether an organization made up of prisoners can proceed *in forma pauperis* (the court held they couldn't), will be blurbed in next month's issue. The other ruling simply disgusts me. In a 6-3 holding Chief Justice Rehnquist, writing for the majority, said that it is okay to execute someone who can prove their innocence. In a dissenting opinion, Justice Blackmun said, "The execution of a person who can show that he is innocent comes perilously close to simple murder." I would say it comes considerably nearer than just "close" to murder. We generally don't report on criminal law cases, and won't be doing a blurb on this one either, but it you want to check it out look up the case of Leonel Herrera in the Supreme Court Reporter. You can read about the triumph of judicial form over the substance of justice.

Lately we have been getting a lot of letters asking us to do legal research, photocopying, writing, and so on for people. Guess it's time for a reminder that Paul and I both work full time prison jobs, we also spend several hours a day in classes (learning about computers), we exercise for at least an hour a day, and of course we visit with loved ones, correspond with friends, and so on. We also publish this paper each month. My point is that what you're reading is about all we have extra time for. We do prepare legal materials for some publications in censorship cases, we vigorously defend against any attempts to censor *PLN*, and we both have our regular political work we do. We simply do not have the time or energy to do a whole lot else. So try to keep your requests to a minimum.

We do have some energy to get a legal study group going. Paul and I will supply the books to those wanting to study law, philosophy, and politics. We will set guidelines and manage progress, so it is not like some sort of book give-away program. We are looking for folks who are willing to devote a little energy to learning more about these areas. Drop us a note if you are interested. If we can get enough people together we'll make a course of it.

That about wraps it up for this month. Be sure to share this paper with comrades.

What's Wrong with this Picture?

By Paul Wright

A judge in Maryland recently sentenced a university student to six months in jail after the student was discovered to have cheated on his Scholastic Aptitude Test (SAT), which is the test used for college admissions. The student cheated by paying another student to take the test for him. The judge stated this was necessary to safeguard the integrity of the college testing program and to teach him responsibility.

We can contrast the judicial and political system's concern with "integrity" and "responsibility" in this country by the treatment of high-ranking government officials accused and convicted for their roles in the Iran-Contra affair. In the mid 80's the U.S. congress passed a law called the Boland amendment, which prohibited the US from providing funds to its mercenary forces in Central America, which were seeking to overthrow the Sandinista government of Nicaragua. Since about 1980 the US had created, armed, trained and supplied the contras. The US's involvement in the war against Nicaragua included the mining of Nicaraguan ports, bombings, and a civil war that left over 30,000 dead and many more wounded and crippled. When Congress cut off funding for the contras the CIA and executive branch of the government simply sought out other sources of funding. At this time the U.S. was secretly supplying arms to Iran for use in its war against Iraq. The arm sales to Iran were also supposed to secure Iranian cooperation in seeking the release of Americans held hostage by Muslim guerrillas in Lebanon. This didn't prevent the U.S. from massively overcharging the Iranians for the weapons involved and then skimming the profits to support the contras. This end run around congress was done at the highest levels of government with the full knowledge it was illegal.

After a Lebanese newspaper broke the story and the arms for hostages and illicit contra funding become known, the U.S. government tried to cover it up. Numerous government officials lied, before and after the story was public, about the government's involvement in these illegal activities.

Lawrence Walsh, a Republican former judge was appointed as a special prosecutor to investigate and prosecute the affair. To date Walsh has prosecuted over a dozen high

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ranking government officials including national security advisor John Poindexter, Marine Lt. Col. Oliver North, Assistant Secretary of State Elliot Abrams, CIA clandestine operations chiefs Alan Friers, Clair George and defense secretary Caspar Weinberger. To date not a single government official convicted of wrongdoing has done a day in jail, nor will they. On Dec. 22, Bush pardoned seven officials convicted of, or waiting trial on charges stemming from the Iran-Contra coverup.

The lawlessness of the system is apparent from the fact that even when charged with criminal offenses these officials are being charged with the "crimes" of lying to congress, obstructing justice, perjury, etc., in the effort to cover up U.S. involvement in these bloody schemes.

They have not been charged with the substantive offenses of waging an illegal, undeclared war against a sovereign country that resulted in 30,000 people murdered and billions of dollars in property damage. Or the craven greed and duplicity that resulted in billions of dollars of arms flowing to Iran which prolonged the gulf war, at the same time the government's official policy was a "tilt" towards Iraq to prevent an Iranian victory. Lying to the American people isn't a crime and to a large degree we expect the government to lie to us. The World Court found the U.S. government guilty of waging an illegal war against Nicaragua. The U.S. for its part has refused to recognize World Court jurisdiction in the case.

The message of all this is if you're a college student and lie about a test you can expect to go to jail. If you're just a government official committing crimes against humanity, and lying about it under oath to congress, expect a slap on the wrist if you get caught and lucrative book, TV and movie deals. American justice at its finest.

Jury Must be Asked if Prisoner Testimony Credible

Jeffrey Rainey was a North Carolina pretrial detainee. He claimed that in the course of a dispute with a jail guard the guard used excessive force against him by slamming him into a wall three times, injuring his back. He filed suit under § 1983 and at trial a jury ruled against him.

Both parties appealed and the Court of Appeals for the Fourth Circuit reversed and remanded the case. The Court held that the lower court was correct in denying qualified immunity summary judgement to the guard. Because the liability issue was a matter of credibility, i.e. who the jury believed in the excessive force issue, summary judgement was not appropriate. The court noted that the guard's testimony was contradictory and characterized it as "post ad hoc rationalization" requiring resolution by a jury.

The court of appeals reversed the verdict against Rainey because the trial court refused to question the jury panel on whether "they would tend to credit the testimony of a law enforcement official over that of a prisoner simply because of their respective positions." The appeals court found this to be a reversible error directly controlled by *United States v. Evans*, 917 F.2d 800 (4th Cir. 1990). The trial court also compounded the error by not giving any jury instructions on the weight to be given to law enforcement officials' testimony.

The appeals court also directed the lower court to admit as evidence a written account of the event Rainey had prepared at the time. Any issue of credibility regarding evidence must be resolved by the jury, not the court. Thus, evidence may not be excluded simply because the trial judge does not find it credible. See: *Rainey v. Conerly*, 973 F.2d 321 (4th Cir. 1992).

§ 1983 Proper Remedy for Disciplinary Violations

Two Arizona state prisoners were found guilty of drug use at a disciplinary hearing and lost 2 years of good time credits, did 15 days in isolation, lost privileges, were moved to higher security levels, and placed on a more restrictive parole status. They filed suit under § 1983 claiming that disciplinary procedures used in Arizona violated their federal rights to due process and equal protection. The district court construed the complaint as a habeas corpus petition and stayed the action until they had exhausted their state remedies.

The Court of Appeals for the Ninth Circuit reversed and remanded. The court notes it has jurisdiction to review an order staying a civil rights action as an exception to the "final order" rule in which only orders disposing of a case are reviewed on appeal.

The court notes that state prisoners challenging the fact or duration of their confinement can only use the writ of habeas corpus, which requires prior exhaustion of state remedies. However, habeas corpus is not the appropriate, or available, remedy for damages claim. Section 1983 authorizes recovery of money damages for constitutional violations and does not require exhaustion of state remedies.

The Ninth Circuit held that "simply because the disciplinary action also involved a revocation of good time, should not prevent the prisoners from pursuing in federal court a remedy made available by congress for deprivation of federal rights by the state." Because significant sanctions were imposed against the prisoners in this case, in addition to the loss of good time, they could file suit under § 1983. In reaching this conclusion the Ninth Circuit rejected rulings from four other circuits that held otherwise. See: *Sisk v. CSO Branch*, 974 F.2d 116 (9th Cir. 1992).

Ex-Louisiana Officials fined For Racial Segregation

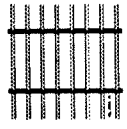
Two former Louisiana corrections officials must pay $4,000 in fines for segregating inmates by race, a federal judge said. In his ruling October 27th in Baton rouge, a U.S. District judge lowered the judgment from $10,000 recommended by a federal magistrate earlier in the year.

Fined were former Department of Public Safety and Corrections Secretary C. Paul Phelps and former Angola Warden Frank Blackburn. U.S. Magistrate Judge Stephen Riedlinger had said Angola inmates were systematically segregated in two-man cells for the ostensible reason that mixing races would cause fights. Riedlinger wrote the recommendation after hearing a case brought by three Angola prisoners in 1985.

The policy violated the inmates' constitutional rights and broke a 1984 legal agreement in which prison officials pledged to run an integrated facility, Riedlinger ruled.

In lowering the fine, District Judge Frank Polozola noted the defendants are no longer state officials and the policy of segregation has been eliminated. In October 1990, the current Angola Warden banned segregation of prisoners by race, according to the report.

From: *Corrections Digest*



Crisis in the French Gulag

By Jean Marc Rouillan

As you may know, the French prison system is one of the worst in Western Europe; its conditions and facilities of confinement are the same as those of bloody Turkey!

In the 1980's things only worsened. Each year there are more prisoners and they are always serving heavier sentences. The number and proportion of prisoners serving life sentences has increased enormously. The new sentencing system also has "security sentences" of 18 to 30 years. This means serving the entire sentence in a maximum security prison with no change of conditions, no good time reduction, no parole, no furloughs, nothing.

These judicial conditions are imposed by courts and tribunals that are always easier about revealing their fascist and anti-proletarian positions. They condemn children and the poor to very severe penalties but at the same time they acquit people like the former chief of police during the Vichy government [*Ed. Note: this was the puppet regime set up by the Nazis during WW II to administer France*] and the chief of the anti-Jewish section of that Nazi government. They also acquit cops or people accused of killing Arabs, Gypsies, and youth of the outer ghettos.

The body of judges represents the first security lobby, but now another pressure group has come to light, from within the prisons themselves: the guards' union. They are extremely right wing; certain groups of them are affiliated with neo-nazi organizations. And these two lobbies openly support the putrification of the Mitterand regime. They are constantly demanding more and more, not only in terms of social favors (higher salaries, better work conditions, "independence", etc.) but also worse conditions for prisoners (penal punishment, isolation, less rights for prisoners, etc.).

The events in the fall of 1992 have occurred in two phases.

Taking advantage of the killing of a guard by a "crazy" prisoner (who had been left in the normal prison population despite the recommendation of psychiatrists), a guards' strike that affected almost every prison in the country took place. But it wasn't a strike like those that had happened before (even though strikes by prison guards are prohibited by law). The strike's goal was to lean on the prisoners to make the prisons explode. We were locked in our cells 24 hours a day without anything, above all, no communication with the outside (no mail, newspapers, visits, etc.). Various prisons exploded with one dead and several injured among the prisoners. After more that 10 days the strike ended, the guards having obtained various advantages and measures but the strike left many conflictive wounds in the prisons that will continue to fester.

Within the prisons the conflicts are rapidly exploding into open conflict. The following has occurred since the strike.

Here in France those condemned to long sentences (more than 10 years) are kept in special penal prisons and among them there are four high security prisons: Moulins, Chatauroux, Clairvaux and Landemezan. After the first strike the guards imposed many punitive measures, provocations, and punishments without cause. The union's official line was to "reintroduce authority." And in two days what was supposed to happen happened: in Chateauroux a helicopter dropped weapons into the yard leaving one dead and several wounded in the ensuing gunfight. In Moulins the prisoners seized the prison and held it for 2 days with 20 guards hostage, various wounded, etc. And finally, in Clairvaux a group of newly arrived prisoners escaped after a shoot out that left a guard and a prisoner dead. Three of the four special prisons have been affected by these events.

The guards went on strike again. As always, taking advantage of the prisoners, leaving us locked in our cells without mail, visits and very little food for two weeks with terrible pressure until the riot police took over the entire prison system. The guards' strike was meant to punish the prisoners. An attitude that was clearly expressed by the level of the guards' hate and through it a clear, irreconcilable break within the prisons. The myth has ended of the guard as "educator." The first priority in these times of the "rights of man": reinsertion. [*Ed. Note: This is the term used by Western European governments for the complete submission to capitalist state authority by political and politicized prisoners.*] We have seen the beginning of the times of brutality. The current period in Europe is one of extermination produced by the seizure of state power by the most reactionary factions of society.

But the resistance is also growing. During the strike various prisons were burned down, shoot outs and escapes continued. Yesterday (Dec. 12, 1992) 3 more prisoners escaped, one was killed...

[*Jean Marc is a political prisoner of Action Directe and a long time prison activist. He, and other AD prisoners have been held in isolation since their capture in the mid 80's. PLN has been permanently banned from the French Prison system because of Jean Marc's previous articles about conditions in the French gulag.*]

Palestinians Sue Tear Gas Maker

According to *Al Fair* of Nov. 23, 1992, in December, 1991, the New York based Center for Constitutional Rights filed suit on behalf of nine families of Palestinians killed by tear gas in Israeli occupied Palestine. The suit, *Abu Zeinah v. Federal Laboratories,* was filed in U.S. District Court in Pittsburgh, PA. The plaintiffs claim the manufacturer is liable for knowing its product was being used dangerously by Israel and continued its sales anyway. The judge has already ruled that U.S. companies are liable for damages caused by their products abroad if they know their product is unreasonably dangerous or likely to be misused. Tear gas is banned by the United Nations as part of its ban on chemical warfare.

Tear gas is a potentially lethal chemical substance. Only its concentration determines whether it will be lethal or not.

The reason we are reporting this suit in *PLN* is because U.S. prison officials routinely use chemical agents, be it mace, tear gas, Capstun, etc., against prisoners, often resulting in serious injury. While the prison officials can, and often are, sued for excessive force in such situations it appears that whole separate cause of action can be filed against the manufacturers of such substances.

Prison officials are almost invariably represented by government lawyers who have no cost incentive to settle or end litigation. Suits against private companies, such as tear gas manufacturers, are different as the manufacturer has to bear the costs of litigation, which come out of its profits. Winning such a suit would add damages and such to the company's expenses. Faced with enough litigation on the matter it is possible that such companies would either withdraw their products from the market or stop selling them to prisoncrats.

Battered Women In Prison

Every fifteen seconds a woman in the U.S. is beaten. One California state prison study found that 93 percent of women who had killed their mates had been battered by them. There are approximately 650 women in California state prisons for killing their abusers.

The California Coalition for Battered Women in Prison was formed in August of 1991 by progressive legal and community groups. Volunteer lawyers, community organizations, prison reform activists and others participate in reaching the goals of the Coalition. As part of a growing national movement aimed at bringing justice to battered women, the Coalition commits itself to assisting women in California who have been convicted of fighting back against their abusive partners, and whose claims of self defense have been largely ignored. The Coalition has filed 21 clemency petitions so far on behalf of women who believe their killings were in self defense or were the only way they could have escaped from a long-term abusive relationship. In one case, a woman was beaten by her spouse for 48 years.

Many battered women in California were convicted before courts recognized the relevance of Battered Women's Syndrome evidence. It was not until January 1st, 1992, that the California Legislature passed a law acknowledging the importance of Battered Women's Syndrome testimony. There is little education provided to juries, judges, attorneys or the public about battering, its effects, and its results.

These women have been abused twice: once by their abusive partners and now by the legal system. To find out how you can help, or to obtain more information, contact:

California Coalition for Battered Women in Prison - LSPC
1535 Mission Street
San Francisco, CA 94103

NIJ To "Study Roots of Crime"

The National Institute of Justice (NIJ) has announced its support for a vast study of the ways in which criminal offenders differ from law-abiding people, and what leads certain people into criminal behavior. Directors of the "Roots of Crime" project said it will be "the most sophisticated, broad-based, and ambitious study ever undertaken of the factors that lead to crime, delinquency, and antisocial behavior."

The study, which also is being sponsored by the John D. and Catherine T. McArthur Foundation, will follow 11,000 randomly selected individuals in approximately 60 communities over a period of eight years, searching for the "roots and natural history of criminal behavior." The researchers said they will focus on a variety of factors that might be related to criminal behavior, including: prenatal drug exposure, adolescent growth patterns, temperament and self-image, poor parenting, school influences, peer influences, differences between girls and boys who begin a criminal career, predictions of dangerousness, and community influences.

Because of the breadth and depth of the project, a small army of researchers will be needed. The subjects will be interviewed and given physical examinations; parents, school teachers, and others with information about the subjects will also be interviewed. The study will track individuals from the time before they are born to age 31.

For the past several years there have been dozens of academic researchers at work planning the project. Pilot studies already have been conducted on specific techniques that will be part of the project, such as the best way to track fathers of subjects. A core group of scientists currently is choosing the precise variables that will be measured, the two major metropolitan areas that will be targeted for the study, and other issues. The study itself is expected to begin early this year. For details about the Program on Human Development and Criminal Behavior, contact Dr. Fenton Earls, Harvard School of Public Health, 667 Huntington Avenue, Boston MA 02115.

Source: *Criminal Justice Newsletter*

[*Editorial Note: The link between unemployment and crime and imprisonment rates is well established. It has been the subject of numerous studies. These date back to the 1800s in England, including a congressional investigation conducted as recently as 1978. It does not take tens of millions of dollars and 31 years of study to figure out that poor and exploited people are the most likely to resort to extra-legal means to deal with their situations. We need jobs, not jails!*]

Oregon Wants Prisoners to Pay for Incarceration

The Oregon DOC has introduced a bill into the Oregon Legislature that would allow the state to charge prisoners for their costs, which include transportation, room, board, clothing, security, medical and other living expenses. According to the DOC, the average cost of care for an Oregon prisoner is $47.85 per day.

Identical bills died in the 1989 and 1991 sessions of the legislature. The state house subcommittee that approved the bill expanded it to allow the DOC to go after not only prisoners' income but also any assets belonging to or due a prisoner.

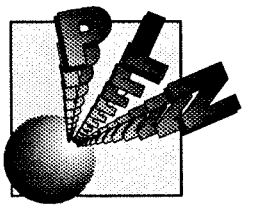
Seattle Times, Jan. 21, 1993.

Package Forwarding Service for Cons

Looking for someone to mail a gift for you? Thanks to a service called Mail-A-Gift, fathers who have never had the chance to select and independently send their child a birthday present can do so now, and husbands can send their wives gifts such as candy or flowers. Mail-A-Gift is a program especially designed for prisoners. It is a small business operated by a prisoner's wife, named Anita Moore, who takes pleasure in being able to bring some joy to the people her small business serves.

Got nobody out there to shop for you, to send you a food package? You can send yourself a package of clothing or other goodies using the Mail-A-Gift service. This is a reasonable and reliable service, not a rip-off, or you would not be reading about it here. You can obtain a price list of the food and other items Mrs. Moore has available, as well as additional information about the service she provides by writing to:

A. Moore Packaging Service
P.O. Box 7516
Citrus Heights, CA 95621-7516



1990 U.S. Prison Population Stats

By Ed Mead

The U.S. Bureau of Justice Statistics has just come out with two more books containing figures on the nation's prison population. The first is a 32-page pamphlet entitled *Census of State and Federal Correctional Facilities-1990,* and the second one is a 189-page book named *Correctional Populations in the United States, 1990.* These materials were not what I would call interesting reading. And I doubt I can make the digestion of this kind of stuff anything close to fun. But here goes...

First off, what states do you think had the most adults under some form of correctional supervision (on probation, in jail, in prison, or on parole) during 1990? If you guessed Texas you were correct. A total of 4.14 percent of all adult Texans are directly under the state's thumb. A surprising second was Maryland, with 3.31 percent of its adults under its correctional authority. And right behind Maryland comes Washington state, with 3.03 percent of its adult citizens either behind bars or under some form of direct supervision. The national average is 2.35 percent.

When we take the actual number of the U.S. resident adult population who are under correctional care or in custody, and then break that down into percentages by race, we come up with some interesting figures. Only 1.7 percent of the adult White population is locked up or under supervision, yet 7.9 percent of the Black population is so situated. 4.2 percent of qualifying people are male, and only .6 percent are female.

There are also figures on the average square feet per inmate by facility in state and federal prisons during 1990. I won't dwell overly long on this other than to say that the national average is 62.4 square feet per inmate in facilities housing between 500 to 999 people. Minnesota had the highest figure with 114.3 square feet; Rhode Island had the lowest with 41.2 square feet (California narrowly missed being last with a mere 41.7 square feet per prisoner). Washington state came in with a not very respectable 53.4 square feet.

Another interesting Washington fact is that out of 3,767 correctional employees, only 175 are assigned to educational functions, and many of those are working in clerical or administrative capacities. In terms of money being spent per prisoner on correctional care, Minnesota spends the most at $30,302 a year. President Clinton's home state of Arkansas has the lowest annual operating expense per inmate of only $7,557. Washington admits to paying a relatively high $19,742 (but their figures do not include administrative costs, such as running the DOC bureaucracy, as part of this amount).

While Blacks make up only a small percentage of the total U.S. population, they are well over represented on America's death rows. As of December 31, 1990, there were 2,356 men and women under death sentences. Of these 1,375 of them were White and 943 were Black (with 38 listed as 'other'). In some states the contrast between the numbers of Blacks and Whites on death rows was quite overwhelming; even though only a small portion of the population is Black they often constuted nearly twice the number of Whites sentenced to death. In the Northeastern U.S. states there were 80 Blacks as opposed to only 52 Whites under sentence of death. In Pennsylvania the ratio was 74 Blacks to 46 Whites. In Indiana the figures are 79 Blacks to 49 Whites. And so on.

Any readers interested is obtaining more detailed information should write to the Bureau of Justice Statistics, Box 6000, Rockville, MD 20850, and ask for *Correctional Populations in the United States, 1990.*

Prisoners File Record Number of Suits

By Paul Wright

We often hear prison officials, the various attorney generals, and the courts complain about what they call a "flood" of prisoner litigation. I, for one, became curious as to how many lawsuits constitute a "flood." I have been in several prisons over the last few years and the one thing they all have in common is the arbitrary manner in which they are run with little regard for either state or federal laws or even their own rules and policies. In many cases this situation continues because prisoners aren't challenging these practices in court.

The Administrative offices of the U.S. Courts has provided me with the statistics for the total number of civil suits commenced in the U.S. District and Appeals Courts from 1987 through and including June of 1992.

There has been a decrease in the total number of suits filed. In 1987 238,982 civil suits were filed, 72,022 by the U.S. government and 22,972 prisoner civil rights cases and 9,542 habeas corpus petitions were filed.

By 1992 the total number of civil suits filed had declined to 226,895; the U.S. government had only filed 63,310 civil cases. Prisoners filed a record 28,308 civil suits and 11,087 habeas corpus petitions.

In the context of more than 1 million Americans in prison or jail at any one time in the U.S., this does not seem to be a very large amount of suits. Certainly more civil rights violations are committed than the number of suits filed would suggest.

The biggest category of suits filed in federal court are contract suits, prisoner civil rights suits are second, followed by free world civil rights suits at 20,975.

The district court with the most prisoner suits filed in 1992 is the District Court in the Middle District of Florida, with 1,002 suits filed. The court with the least is the District Court in North Dakota with 9. Prisoners in Washington state filed 181 civil rights cases in the Eastern District and 172 in the Western district.

By Circuit, prisoners filed the most civil rights suits in the Eleventh Circuit, with 4,140 suits filed. The runner up is the 5th Circuit, with 4,034 suits filed. So we see that two circuits accounting for six states result in over a quarter of all civil rights suits filed by prisoners. All the states are in the south and border each other from Texas to Florida. Prisoners filed the least in the 1st Circuit with a mere 249.

The federal courts are jammed with criminal cases, mainly drug cases, that are a result of the "war on drugs." Because criminal cases have taken priority due to speedy trial rights of criminal defendants, civil cases wind up on the back burner. The result is that after getting up into prison on the conveyor belt justice program, it takes years to challenge either their conviction or the deteriorating conditions of confinement caused by the massive overcrowding of the last decade's prison building binge.

No Welcome For Princess Anne

Princess Anne of British royal family fame, did not receive a friendly welcome from some her less fortunate subjects when she paid a visit to Horfield Prison in Bristol.

Prisoners threw food and rubbish in a protest over conditions before the visit, and among the whistles and catcalls when she did arrive was one loud cry of "Up the IRA!"

Clinton for Prisoners: More Bad News

By Paul Wright

With Clinton's election many prisoners are optimistic that there will be some changes for the better after 12 years of jackboot politics by the Republicans. In past issues of *PLN* I've mentioned Clinton's despicable record on the death penalty. That record includes 4 executions, dozens of death warrants signed, never commuting a death sentence and executing a brain damaged black man in the middle of his campaign and using the execution to brag to the media about how "tough on crime" he is. During his tenure as governor of Arkansas that state has had the distinction of spending less money on its prisoners than any other state, and being notorious for the harsh conditions of its prisons.

But maybe Clinton is going to turn a new leaf now that he's President, right? During his campaign Clinton made the following promises of what he would do when he was elected, all of which affect prisoners.

One of the centerpieces of his national service plan is to put 100,000 new police on the streets. The U.S. currently has about 500,000 law enforcement people. A 20 percent increase is quite significant. What no one has mentioned is that more cops will likely mean more arrests requiring more prosecutors, more judges and more prisons. So the ripple effect will mean the continued expansion of the prison system. It also means a bigger police presence and occupation of the poor neighborhoods in the U.S.

Speaking of police occupation of our communities, Clinton wants to make "high crime communities eligible for federal aid for proven anti-crime measures." I bet that "proven anti-crime measures" means more cops and more repression. "High Crime" is the codeword for minority and poor neighborhoods. Until there are jobs that pay decent wages, affordable housing, health care and good schools the "crime problem" will persist.

But Clinton is also thinking of the schools. He wants to make schools eligible for federal aid to buy metal detectors and security staff. He also wants to encourage states to give schools greater authority to conduct locker and vehicle searches. So much for the fourth amendment's ban on searches and seizures. Blanket searches without individualized suspicion were the reason the fourth amendment was created. But it'll only affect kids, who can't vote, so who cares. This will help schools look and feel more like prisons. A lot of schools already have the razor wire, high walls and armed guards that a lot of prisons don't even have.

For first time, non-violent offenders Clinton wants community "boot camps." Right now first time non-violent offenders are likely to get probation or a little jail time as a sanction. Boot camp is an increase in punishment. There is also no evidence that these "boot camps" do any better at rehabilitation than probation, where the offender stays in the community and can keep job and family relations intact. Having gone through the real boot camp run by the army I don't see what connection there is between rehabilitation and being shouted at, abused, and forced to do menial labor. If there were maybe there wouldn't be so many veterans in prison.

Next Clinton has promised to "require criminals to serve jail sentences in 'real prisons' not 'high tech summer camps'." He hasn't said how he proposes to do this. There is also the matter of perceptions. So, how many of you *PLN* readers on the inside are in a "high tech summer camp?" I bet guys at Marion will want to know if they're in a "real prison" or not.

Just as a matter of curiosity, Clinton's brother Roger is a convicted cocaine trafficker who did a few years in prison in the '80's. Where did he do time at? Was it Leavanworth, Lompoc or one of the other "real prisons" or was it a "summer camp?" I'm willing to hazard a guess which one it was.

Remember the longer and longer sentences of the Reagan/Bush years? Well, Clinton has promised to enact "tougher sentences for criminals who use guns." Yeah, criminals were getting off way too lightly with the Armed Career Criminal Act which imposes 25 years without parole for possession (not use, mind you) of a firearm by a felon. The 20 year mandatory for carrying a gun during a drug felony and the 20 and 30 year mandatories for possession of a full auto or a silencer are far too lenient, especially with that 56 days a year good time. So Big Bill is going to get tough on the sentencing. Why stop there, may as well give out 10 years for jaywalking and the death penalty for burglary, show people you're really tough.

As a sop to the gun control lobby, Clinton has promised to sign the Brady bill which mandates a 5 day waiting period for handgun purchases and to limit access to multiple round clips. As we know, when guns are outlawed only the police will have guns, and that's a scary thought. I'm sure that places like New York, New Jersey, Washington D.C., with almost total bans on firearms sales, are examples of what Clinton thinks this will accomplish.

Well, those, according to the *Seattle Times*, are the highlights of Clinton's "crime program." The only difference I see between this and anything Reagan/Bush and the rest of the Hitler Youth would have given us is that Clinton is openly for gun control.

The dynamics of capitalism don't rely on individuals. The policies of the ruling class to safeguard their economic and political interests will go ahead regardless of who the figurehead in the White House is. In a year or two I'll write another article to see how Clinton has fared in making good on his campaign promises. I expect to say "I told you so" to those who still think there's going to be any kind of meaningful change with Clinton in the Whitehouse. As the capitalist system sinks into greater economic crisis we're going to see more repression at home and abroad. Of course, *PLN* will be here to give a running account of battle damage to prisoners as this process unfolds.

Disabled Executed

On January 19, 1993, the state of Virginia executed Charles Stamper. Stamper had been confined to a wheelchair since his spinal cord was injured in a prison brawl. Stamper was denied permission to walk to the electric chair in leg braces and a walker. Instead, prison guards shuffled him into the electric chair.

Death penalty foes claimed the execution was not necessary because Stamper was no longer a danger due to his handicap. Some advocates for the disabled [*Ed. Note: some advocates!*] argued he was entitled to no special considerations because he was handicapped.

The United States is one of the few countries in the world that executes its juveniles and mentally retarded. To that dubious distinction we can add the execution of the handicapped as well.

Reviews and Correspondence

by Paul Wright

Crossroad: A New Afrikan Captured Combatant Newsletter is a quarterly publication which specializes in coverage of political prisoners and prisoners of war in the U.S. from a New Afrikan perspective. Recent issues have included an excellent interview with Assata Shakur, peer advocacy in AIDS education in prison, control units, and more. An excellent publication for the politically inclined. Subscriptions are $1.50 per issue for prisoners, $3.00 per issue for free people. Contact: Spear and Shield Publications, 1340 West Irving Park, Suite 108, Chicago IL 60613.

Prison Life is a slick, well produced bi-monthly magazine that covers, as its title implies, prison life. Its premier issue published in December of 1992 includes articles on parole, drug abuse, prisoners selling their body organs, mothers behind bars, a TV station run by prisoners in Missouri, and more. It contains columns of book reviews, interviews, pen pal ads, in-cell cooking, profiles on ex-prisoners, letters and more. It is 100 pages long, with extensive color photos, ads, etc. Subscriptions costs are $19.95 per year. Contact: *Prison Life* Magazine, 111 S. 9th St. Suite 3, Columbia, MO 65201.

Gray Areas is a new, well-produced magazine that is aiming to replace the old "Factsheet Five" as the directory of the alternative press. Their first issue has an interview with Frank Zappa, lots of video, music and magazine reviews, an article on Grateful Dead videos and much more. If you publish or record you should send GA copies so they can review the material and let others know about it. It fills a vital need in the alternative press community. A four issue subscription is $18.00 to: *Gray Areas*, PO Box 808, Broomall, PA 19008-0808.

Profane Existance is a bi-monthly anarchist tabloid covering news, music and anti-capitalist counter culture. Each issue is packed with a variety of news and information including interviews, music and publication reviews and more. It also focuses on prison news and struggle. Subscriptions are $10.50 a year. Contact: *Profane Existance*, P.O. Box 8722, Minneapolis, MN 55408.

Inside Journal is the bi-monthly tabloid of Prison Fellowship, a Christian prison group founded by former Watergate prisoner Chuck Colson. It covers issues of interest to prisoners such as voting rights of prisoners, changes in sentencing, Small Business Administration loans for prisoners and more. Contact: *Inside Journal*, P.O. Box 16429, Washington D.C. 20041-6429.

Revolutionary Worker is the weelky taboid of the Revolutionary Communist Party (RCP), a Maoist party. Each issue contains news and analysis of world events. Recent issues have had coverage of events in Somalia, Peru, the U.S., the campaign to save Mumia Abu Jamal's life and more. Subscriptions are free to prisoners on request, $40.00 a year to free people. Write: RCP Publications, P.O. Box 3486, Chicago, IL 60645.

Coalition for Prisoners Rights Newsletter is a monthly newsletter published by the Coalition for Prisoners Rights. While focusing on the infamous Santa Fe Penitentiary in New Mexico it also covers prison news from across the country. Subscriptions are $10.00 a year. Contact: CPR, P.O. Box 1911, Santa Fe, NM 85704.

CJS News is the bi-monthly newsletter of the Criminal Justice society of Florida. Each issue is packed with judicial and DOC information affecting Florida prisoners as well as articles, news briefs, and alternatives to the current way of doing things in Florida. The newletter is free upon request to those interested. Donations are appreciated. Write: *CJS News*, P.O. Box 1914, Orange Park, FL 32067-1914.

Deep Water is a 90 page soft cover book by Khadijah Abdullah Fardan. The book is about maintaining relationships when one member is imprisoned. The book is written from a New Afrikan Muslim perspective but the author's perceptions are applicable to anyone whose partner or significant other is in prison. The author uses narratives, poetry and pictures to describe and convey the challenges and sacrifices she has faced in maintaining an "inside" relationship and the impact of racism in the process.

The book is divided through several chapters begining with Khadijah's own relationship, the hassles of prison visiting, the growth of the relationship, the sexual aspects of such relationships and coping and organizing on the outside. Definitely well worth reading for everyone either involved or planning to get involved in a prison relationship. It brings to mind the comment that "The only real prisons are in our minds." Copies of *Deep Water* are available for $9.95 from: Overdue Media, P.O. Box 5203, Roanoke, VA 24012.

Oh-Toh-Kin is an irregularly published tabloid that covers the struggles of Native peoples in North America. Their most recent issue had articles on Native prisoners in Canadian prisons, natives struggles in U.S. prisons and the long use of prisons as a tool of colonialism/imperialism and more. An excellant publication for those interested in native and prison struggles. Free to prisoners, $10.00 for 4 issues. Write: *Oh-Toh-Kin*, P.O. Box 2881, Vancouver B.C., V6B 3X4, Canada.

Outlook on Justice is the quarterly newsletter of the New England American Friends Service Committee criminal justice program. Each issue lists resources and programs useful to prisoners in prison and those getting out soon. *Outlook* also publishes articles, poems, statistics, and news items of interest to prisoners and their advocates. Subscriptions are $2.00 a year to prisoners; $7.00 per year for free people. Write: *Outlood on Justice*, 2161 Massachutsetts Ave., Cambridge, MA 02140

Pelican Bay Prison Express is the quarterly newsletter of the Pelican Bay Information Project. Pelican Bay is the notorious control unit prison in Nothern California. The *PBPE* focuses on events at Pelican Bay with the goal of raising public awareness of what is happening in that dungeon. The latest issue has the results of interviews with 25 prisoners at Pelican Bay, poems, news and more. Subscriptions are available for a donation. Write: *PBIP*, 2489 Mission St. # 28, San Francisco, CA 94110.

Letters From Readers

Wants to Help

I am currently a prisoner incarcerated at the Potosi Correctional Center, in Mineral Point Missouri. I have just finished reading your November issue of *PLN* and I am fascinated with your newsletter. I was unaware that this newsletter existed, and now that I am, I'm "hooked"! I found your newsletter very exciting and, most importantly, very informing. Thank you for taking the time to inform all of those incarcerated of the goings on within the prisons across the country, and how we, as inmates, can stand up to the injustice which takes place daily within every institution. I would desperately like to become a subscriber to your newsletter. Unfortunately, I am financially unable to afford the subscription

Continued on back page...

cost. I would be willing to volunteer, in any way, as payment to a subscription to your newsletter. I can also guarantee a donation of ten stamps, maybe more depending on financial status, per month for a subscription, anything. Even if this can not be accepted, I would like to volunteer my services and make a monthly donation, as this is a really good cause. You inform not only prisoners, but those on the outside as well, of the happenings behind and inside prison walls. I thank the entire staff for giving me so much information after reading just this one newsletter - you guys also cite cases of the stories you print - unbelievable. I have read a few prison newsletters, but none as good and informative as *PLN*. Keep up the excellent work. You've just made yourselves a fan. Peace, and Thank You.

M.W., Mineral Point, MO

Each Issue Helps Him

I want to thank you for the most up to date newsletter that I have ever received. I read this newsletter cover to cover, share it with others and then keep it on file for future use. I always review the old copies if I am writing a writ and 99% of the time I will find something pertaining to the issue I am confronting.

North Carolina has no law library for its prison units. Your newsletter provides me with a way to receive information and cutting edge case law at a reasonable cost.

S.L., Asheville, NC

Locked Down in Indiana

I am writing in regards to a lock down that we have been subject to since July 10, 1992. We are reaching out for help to try to get off for the following reasons.

We have been placed on lock for no disciplinary reasons. We have had several changes in our superintendent's office over the year. We have been confined to our cells 24 hours a day, limited to one shower every 8 to 10 days, given only two cold sack lunches a day. We are supposed to receive one hot meal a week, but it is cold before we receive it; but our most important problems are the receiving of medical treatment. We cannot use the law library, getting laundry cleaned is very limited. We have roaches and mice around us daily. We receive no cleaning supplies for our cells, we have no proper ventilation in our cells, we cannot order food items, our commissary is strictly limited. Are our constitutional rights being violated? Yes. Why should we be punished if we have not broken any rules, should we be subjected to cruel and unusual punishment for the past 10 months for improper reasons?

We should NOT have to suffer the mental and physical stress that we are now put in the position to endure. Please I ask for all the prisoners at the Indiana State Prison that you print this and help us put an end to this punishment for no reason...

D.S., Indiana State Prison

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If you have not made a donation of stamps or money to PLN, then please do so now. Suggested donation is $10.00 for individuals. Send such contributions to:

Prison Legal News
P.O. Box 1684
Lake Worth, Florida 33460

Mail your submissions of articles, artwork, etc. to either Ed Mead # 251397 or Paul Wright # 930783 at the following address: Washington State Reformatory P.O. Box 777, Monroe, Washington 98272.

If you are located in Europe or the Middle East, send financial contributions to Durchblich, c/o Buchladen, Gneisenaustr. 2A, 1000 Berlin 61, Germany. Readers in Latin America, Australia and New Zealand can send their PLN donations to Arm The Spirit, P.O. Box 57584, Jackson Station, Hamilton, Ont., Canada L8P 4X3.

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Prison Legal News

Working to Extend Democracy to All

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Three Strikes and You're Out, Again

by Ed Mead

Their baaack! And this time with both barrels. Ida (now Republican state representative from Mercer Island) Ballasiotes and her fellow victims' rights cronies have reintroduced the so-called "three strikes and you're out" initiative. In addition to Citizens' Initiative 593, this group and a bunch of reactionary legislators have introduced House Bill 1139, a proposed new law that contains the exact same language as Initiative 593. If the legislators don't implement this draconian law, they hope the voters will. At this point, given the anti-crime hysteria whipped up in the public's mind by the bourgeois media, it is likely that one of these avenues of passage will be successful. Washington state prisoners and their families should be aware of the probable shape of things to come.

The three-strike initiative campaign was launched last year, but failed to gather enough signatures to get it on the ballot. This was not due to a lack of public support for the concept of the law, but rather because the signature gathering process had been started too late. This year the victims' rights lobby has hit the ground running. The official ballot summary states:

> "This initiative requires persons convicted of 'most serious offenses' on three occasions be sentenced to life imprisonment without early release, community custody, furloughs or parole. 'Most serious offenses' includes class A felonies (violent offenses); and extortion, indecent liberties, manslaughter, vehicular assault or homicide, incest with a child under 14, felony with a deadly weapon, exploiting children for pornography, coerced prostitution, controlled substance homicide; second degree assault, child molestation, kidnapping, robbery, child assault, and third degree rape."

If the state legislature does not pass this law, initiative workers will need to get 183,000 signatures by July 1st. If they are able to acquire the necessary number of signatures, the proposed law will be placed on the general ballot during the November elections.

The list of offenses contained in the above quoted ballot summary isn't complete. The proposed new law would also contain such vague crimes as "leading organized crime" and "sexual exploitation." A couple of catch all sections could include nearly all felons, such as any class B felony with a sexual motivation (stealing a box full of pornographic magazines?) and the commission of any other felony with a deadly weapon verdict (poaching?).

So all of the above crimes, along with many others, are to be called "most serious offenses." Committing one of the listed crimes, and having prior convictions in this state or elsewhere for them on two separate occasions, qualifies you as a "persistent offender." According to the proposed law, "a persistent offender shall be sentenced to a term of total confinement for life without the possibility of parole..."

The people who have introduced and who support this law are sincere but short-sighted individuals who believe in the efficiency of punishment. Its endorsers include the Washington Council of Police Officers, the King County Police Officers' Guild, Friends of Diane, Tennis Shoe Brigade, Coalition of Victim Advocates, Washington State Grange and so on. Rather than examine the root causes of crime, they focus all of their attention on the offender; they treat the symptom and not the illness. And the medicine they prescribe, like every tyrant in history, is ever increasing doses of repression.

The SRA was enacted in order to get tough on violent crime. Since its adoption in 1984, the legislature has increased the SRA guideline sentencing ranges for violent offenses every year. Yet the rate of violent crime continues to grow faster than the increase in population. Their response is of course more of what clearly hasn't worked. This year it comes to us in the form of HB-1139 and Initiative 593. Historically, this process ends when such modest behavior as picking a pocket or chopping down a tree on a public lane become capital crimes (as was the case in feudal England), and what generally puts an end to this process is revolution.

What can you do in the here-and-now to oppose this law? Not very much. You and your friends can write and obtain a copy (or better yet several copies) of Initiative 593 from:

Washington Citizens For Justice
223 - 105th NE, Suite 201
Seattle, WA 98004

Write something like "get a life" on the signature section of it and mail it back to them, with a three cent stamp so they will have to pay postage due. Folks on the outside can dial their toll-free (800) 775-3201 number, often, if they'd like more details on all this. If there's to be any serious effort to oppose the house bill and the initiative, however, it will have to come from the family members and loved ones of prisoners on the outside. They can vote and can work to defeat law makers who advocate taking these easy ways out of complex social problems. It would be nice if the initiative process could be used to generate a genuine public debate on the subject of crime and punishment.

So far we have been unable to find any criminal justice issue around which ex-cons or our loved ones on the outside would be willing to organize. We'd hoped opposition to the parole board would be the key, but personality conflicts and such prevented any real unity from developing. If you have some ideas on how to proceed in this area, we are certainly willing to listen. While I'm not optimistic that the threat of life without parole will motivate this state's readers to action, I at least hope this article has been informative. The young minorities who will be the primary victims of this proposed law are going to need all the information they can get.

Prison Escapes and Killings Down

Incarceration rates in the United States and Canada are on the rise. Overcrowded conditions are being felt by more and more prisons. Despite all this, the number of prison escapes and homicides has decreased. Fifty state systems, the District of Columbia, and the federal Bureau of Prisons responded to a recent survey by *Corrections Compendium* regarding prison escapes and violence.

In 1991, prison populations in the U.S. grew by more than 76,000 in the 49 systems reporting. For the same period there were 5,793 escapes. This is a decrease of 1,451 from 1990's figure of 7,244. The escape rate has continually decreased since 1984, when a reported 1.93 percent of the inmate population (7,903) escaped. In 1991, the escape rate decreased to .78 percent.

Thirty-two U.S. systems, including the federal Bureau of Prisons, reported a decrease in escapes, owing to better inmate classification procedures, increase in staffing and training and an advancement of technology in security equipment. An increase in escapes was reported in seven systems due to an increase in population, specifically community or open institutions which makes it easier for an inmate to "walk away."

Escapes by low-risk inmates (minimum security custody) decreased by almost 1,500 from 1990 figures, while escapes from community custody and furloughs show a decrease of 707. Many more inmates escaped from behind the bars of medium or maximum security institutions - 399 in 1991 as opposed to 327 in 1990. California, with the highest number of incarcerated offenders in a state system, also had the highest number of escapes, 1,196. However, Delaware reported the highest escape rate, 8.46 percent. The federal Bureau of Prisons, with a prison population of 52,588, reported an escape rate of less than .01 percent.

Of the 49 reporting U.S. systems, the number of escapees returned to custody was 78 percent, a decrease from 1990's figure of 86 percent.

In Canada, with seven provinces and the Correctional Service of Canada reporting, 562 escapes and 769 unlawfully-at-large (UAL) occurred in 1991, making the escape rate 2.07 percent and the UAL rate 2.82 percent. This is an increase over 1990's figure of 461 escapes in eight of the provinces. The Correctional Services of Canada, which housed the most inmates, had the lowest escape rate, .57 percent. The highest percentage of escapes in 1991 was 12.6 percent in Manitoba. Canada increased their escapee return rate from 86 percent in 1990 to 88 percent in 1991.

Homicides within America's prison walls also declined in 1991. Inmate deaths have been reduced by half since *Compendium*'s first prison violence survey in 1984. Also, for the first time since 1984, there have been no staff homicides reported in the 49 responding U.S. systems.

Inmates killed by staff members, not surveyed previously, occurred in Arkansas, California and North Carolina. A distinct increase of inmate and staff assaults by inmates was reported. Assaults on staff by inmates increased by 2,519 and assaults on inmates increased 2,438 over 1990's figures. Inmate suicides increased slightly, going from 101 in 1990 to 112 in 1991.

In Canada, of the eight reporting jurisdictions, Ontario and the Correctional Services of Canada reported five inmate homicides and no staff homicides. Only the Correctional Services of Canada reported two inmates killed by staff members. Assaults on staff by inmates decreased slightly from 42 in 1990 to 37 in 1991 for the same provincial systems. As in the U.S., Canadian provinces also reported an increase in assaults on inmates by inmates of 148 for 1991, up from 102 in 1990. Twenty-five inmate suicides were reported in four Canadian systems, a decrease from 55 reported in 1990. Two staff members killed inmates in Correctional Services of Canada facilities.

Over 150 riots or disturbances occurred in 20 U.S. systems and the federal Bureau of Prisons. Maryland reported a riot involving 41 inmates, injuring 14 officers and causing over $1 million damage to the facility. Texas reported the most disturbances, 47, involving several inmates, but did not submit any specific information. Canada reported 17 occurrences in two provincial systems and the Correctional Services of Canada.

From: *Corrections Compendium*

24 Cops Slain in First Half of 1992

FBI Director William S. Sessions announced that 24 law enforcement officer were killed feloniously in the line of duty during the first six months of 1992, a sharp reduction from the 44 officer slain during the first half of 1991. Another 29 officers were killed by accidents that occurred during the performance of their duties, the FBI said.

Firearms were the weapon most used in the slaying of officers, accounting for 19 of the 24 killings this year. One officer was killed by a bomb explosion, and four were intentionally struck by vehicles.

About half of the slain officers were killed during arrest situations. Of those, six were attempting to prevent robberies or apprehend burglary suspects. Four officers were killed while responding to disturbance calls; and two were slain while investigating suspicious persons or circumstances.

Nearly all of the slayings occurred in Southern (14 officers) or Western (six officers) states.

From: *Criminal Justice Newsletter*

Release not Appropriate Relief for Beatings

Samuel Brown is a New York state prisoner. Brown was convicted of three counts of felony murder arising from an armored car robbery in upstate New York by the Revolutionary Armed Task Force. Brown became an FBI informant and was later tried and convicted.

This case is Brown's federal habeas corpus petition contesting his criminal conviction. The district court found that jail guards beat Brown three to six times a day for five days, causing severe injuries and then denied Brown medical treatment for 75 days. Brown raised the beatings as a grounds for relief in his petition.

At pages 948-50 the court gives a detailed discussion of remedies available to protect prisoners from government abuse. The court ordered the district attorney to send copies of the court order to Governor Cuomo and the state officials responsible for operating the Rockland county jail for them to report to the court what investigative efforts and remedial measures have taken place since Brown's beating. The court held that the beatings and lack of treatment did violate the eighth amendment. But such violations are only grounds for money damages or injunctive relief, not release. The court said it would give further consideration to the matter upon receipt of the requested report from state officials. See: *Brown v. Doe*, 803 F. Supp 932 (SD NY 1992).

NYC Claims Prisoners Shoot Themselves to File Suit

New York City commissioners claim that for the last several years prisoners have paid jail guards to smuggle guns in to them, whereupon they shoot themselves and then sue the city for failing to protect them. A city official claims "There are at least five lawsuits presently pending against the city involving incidents where we have evidence that the wound was either self-inflicted, or inflicted at the direction of the injured inmate. An inmate would pay a corrections officer to bring in a gun to shoot himself so that he could bring a lawsuit or get some favor from jail authorities, such as reduced bail or improved jail accommodations."

On January 2, 1993, a gun smuggled into a jail's maximum security section accidentally discharged and wounded a jail guard. A prisoner is suspected in that shooting. Another jail guard has been arrested and charged with smuggling the gun in. City officials claim guards have been paid between $1,100 and $7,500 to smuggle in guns. Since 1987, 16 handguns have been found in city jails.

A city official states that investigations have shown a pattern to the shootings: in each case wounded prisoners could not identify their assailants, even when the shootings took place in well lit areas of maximum security prisons and each prisoner suffered only a grazing wound on a fleshy part of the body.

To date none of the suits have come to trial. One suit seeks $8.5 million in damages.

Seattle Times, Jan. 21, 1993.

NY Corrections Commissioner Pleads Guilty

William Jenkins, a former assistant corrections commissioner pleaded guilty in January to charges that he extorted money from a janitorial supplies company which served the city's jails. Jenkins, who was responsible for the Corrections Department's assets management, is scheduled to be sentenced March 19, 1993. Prosecutors said Jenkins received $24,000 in cash and hundreds of dollars worth of toilet paper in exchange for awarding $240,000 in contracts to the company. He was arrested and dismissed from his position last October.

Source: *On the Line*

Inquiry Stepped up in Georgia Prison Sex Case

Authorities in Georgia said they have intensified an investigation into alleged sexual abuse at a Georgia women's prison after 14 current and former state corrections employees were indicted on rape and sexual assault charges.

A grand jury returned the indictments after prosecutors laid out the accusations in graphic detail. The indictments came more than eight months after the Georgia Bureau of Investigation (GBI) began probing allegations that officers had sexually abused inmates at the Georgia Women's Correctional Institution in Hardwick.

The GBI initiated its investigation after more than 100 inmates spoke out as part of a 1984 lawsuit filed against the prison. The suit claimed female inmates were subjected to rape, sodomy and other sexual assaults. Prison employees coerced inmates into prostituting themselves, trading sex for favors, and in some cases forced prisoners to have abortions, the suit said.

The defendants named in the indictments, 10 men and four women, were all arrested last November. Of the 14, six were fired, six quit, and two have been suspended. Additional indictments are likely, including some from the Milan Women's Center and the Washington Correctional Institution.

Robert Cullen, an attorney for the inmates, said he was "heartened" by the indictments but a "high level of sexual abuse continues to occur" in the state's prison for women.

Since March of 1992, more than 100 inmates have taken polygraph tests or given sworn statements implicating about 50 employees at the three prisons. In the past eight months, nine employees have been fired, while nine have resigned rather than be fired. Another four have been transferred and six suspended, four of them without pay.

From: *Corrections Digest*

VA Builds More Prisons

A projected 38 percent increase in the states prison population within the next five years has prompted Governor Douglas Wilder to propose a $111.7 million prison construction project. The proposal includes construction of a 1,046 bed women's prison, a 697 bed men's prison, a 100 bed maximum security juvenile facility, a 24 bed work release center and a day reporting center that would handle as many as 600 prisoners assigned for technical violations of probation or parole. DOC officials had asked for $305 million but Wilder included only what aides said were the most critical projects in his proposal.

Source: *On the Line*

Death Row Prisoners can Marry

Roger Buehl is a Pennsylvania state prisoner on death row. In 1990 Buehl requested permission for a special one time visit in order to marry his girlfriend, Deborah Ayres. Prison officials denied the request citing a 1985 incident where Ayres had been caught smuggling three balloons of marijuana to another death row prisoner. Previous requests by Buehl to add Ayres to his visiting list had been denied. After unsuccessfully administratively appealing the denial Buehl and Ayres filed suit under § 1983 claiming violation of their constitutional right to marry.

Prison officials moved for summary judgement which the district court granted in part and denied in part. The court notes that prisoners have a constitutional right to marry but do not have a right to visitation. The court lists extensive cases concerning visitation in general.

The court denied summary judgement to the defendants by noting that they had not identified any security risk in a brief, one time visit for the marriage ceremony at a time and place of the warden's choosing. The court notes that a valid reason to deny Ayres general visitation privileges does not justify the denial of Buehl's right to marry.

The court granted the defendants qualified immunity from money damages, holding that they could have reasonably believed they could deny Ayres institutional access for any reason. They reached this conclusion despite the Supreme Court decision in *Turner v. Safely*, 482 US 78, 107 S.Ct. 2254 (1987), which held that prisoners have a right to marry. The case will proceed to trial on the plaintiff's request for injunctive relief. See: *Buehl v. Lehman*, 802 F. Supp 1266 (ED PA 1992).

Denial of Winter Clothing Cruel and Unusual

In February, 1990, several Iowa prisoners were placed outdoors without hats or gloves for an hour while guards searched their living unit. The temperature was about 30 degrees F. The prisoners did not suffer any long term injury from the experience. The prisoners filed suit and the district court ruled in their favor, holding their eighth amendment rights had been violated.

PLN has reported this case in the past as it has wound its way through the system. The current cases are two opinions by the district court after a remand from the court of appeals at 973 F.2d 686 (8th Cir. 1992, *PLN*, vol. 4, no. 3)

In the two opinions the district court gives a good explanation of the objective and subjective factors that need to be proven by prisoners filing eighth amendment suits. The court cites numerous cases which hold that prisoners have a right to adequate clothing to protect them from weather conditions. Denial of proper winter clothing is a deliberate infliction of pain totally without penological justification that violates the eighth amendment.

The court held that the claim by defendants that they were concerned that the prisoners would hide contraband in the hats and gloves was unfounded. The court considered the fact that the hats and gloves were readily available in ruling against the prison officials. The court awarded each plaintiff $75.00 in damages. See: *Gordon v. Faber*, 800 F. Supp 793 and 797 (ND Iowa, 1991, 1992).

Punishment of Pretrial Detainees Unlawful

Spencer Parker is a pretrial detainee in Texas. While awaiting trial in the jail's minimum security section he was moved to the violent offenders section in retaliation for arguing with a guard. As a result of the transfer he was assaulted and lost his right eye and was denied proper post-operative treatment. Parker filed suit under § 1983 and the district court dismissed the complaint as being frivolous under 28 U.S.C. § 1915 (d), before service on the defendants.

Parker appealed and the court of appeals for the fifth circuit reversed and remanded.

The court of appeals begins by noting that district courts have a duty to closely examine pro se prisoner complaints to ensure they are not prematurely dismissed. Using the Supreme Court's test for "frivolousness" (set out in *Nietzke v. Williams*, 490 US 319, 323-25, 109 S.Ct. 1827, 1831 (1989)), the court held that Parker's suit was not frivolous.

The court notes that pretrial detainees may not be subjected to any treatment amounting to punishment because they have not been convicted of any crime. Pretrial detainees are entitled to protection from adverse conditions of confinement created by prison officials for punitive purposes. Thus, Parker has stated a valid legal claim and is entitled to an opportunity to develop his claims.

Pretrial detainees are also entitled to reasonable medical care. This claim was also remanded for development of a factual record so that the district court can fully investigate the facts surrounding Parker's medical treatment.

The appeals court also instructed the district court to appoint counsel to represent Parker to assist him in investigating and litigating his claims. See: *Parker v. Carpenter*, 978 F.2d 190 (5th Cir. 1992).

Right to Religious Diet Clearly Established

Warren Bass is a Jewish New York state prisoner. Despite the recommendation of the prison rabbi that Bass was sincere in his religious beliefs and should receive a kosher diet, prison officials refused to provide Bass with a kosher diet. Bass filed suit under § 1983 claiming the denial of a kosher diet violates his right to practice his religion.

The defendants had sought qualified immunity from damages contending Bass did not have a clearly established right to a religious diet. The district court denied the qualified immunity motion and the court of appeals affirmed in the defendant's interlocutory appeal at *Bass v. Coughlin*, 976 F.2d 98 (2nd Cir. 1992), which *PLN* reported (*PLN*, vol. 4, no. 3)..

In this opinion the district court provides an extensive discussion of how courts should examine qualified immunity defenses by government officials.

At pages 1070-72 the court gives a detailed examination of cases that hold that prisoners are entitled to a diet consistent with their religious beliefs. Because there was a clear and controlling legal authority establishing this right as far back as 1969, and continuously affirmed up to the present, prison officials were clearly not entitled to qualified immunity for their actions. See: *Bass v. Coughlin*, 800 F. Supp 1066 (ND NY 1991).

Change in IFP Status Does not Require Fee Payment

Michael Murphy is a Missouri state prisoner who filed suit claiming his religious rights had been infringed by prison officials. At the time he filed suit he earned $30 a month at his prison job and had $53 in his prison account. To file his suit he sought, and was granted, In Forma Pauperis (IFP) status to proceed as an indigent. The court did require that he pay a partial $13 filing fee rather than the full $120 filing fee.

Nearly three years after filing the suit Murphy was placed in work release and had about $1,300 in savings. The defendants moved the court to dismiss the suit because Murphy had not promptly notified the court of the change in his financial status. As an alternative, they moved the court to reconsider Murphy's IFP status, require him to pay the full filing fee and/or discharge his appointed counsel.

The district court, in the first ruling on this subject in the eighth circuit, held that dismissal of a suit is not warranted due to a change in the indigent's finances. The court gives an extensive discussion, with numerous citations, of cases involving indigents' IFP status, changes in finances, the legislative history and intent of the IFP statute, etc.

The court held what was important was the indigent's financial status at the time he applies for IFP status. Changes in financial status after the litigation is begun do not warrant revocations of IFP status. Because government funds are not being expended (the court only waives the fees for filing and process serving) there is nothing to be gained by forcing payment of the fees at a later stage of the proceedings. Because the court cannot compel counsel to represent indigents in civil matters, appointed counsel may continue to represent plaintiffs whose IFP status has been revoked. The district court ruled against prison officials on all points in this case. See: *Murphy v. Jones*, 801 F. Supp 283 (ED MO 1992).

Confiscation of Law Books States Claim

Tyrone Chavers is a Wisconsin state prisoner. He filed suit under § 1983 after prison officials confiscated his lawbooks. This case is the district court's ruling on Chavers' In Forma Pauperis (IFP) request. The defendants had not yet been served in the case.

The court held that Chavers had adequately alleged his indigence. Because Chavers did not claim that the confiscation of his legal materials affected his ability to litigate, however, the court held that this claim was legally frivolous and had no arguable basis in law.

The court went on to hold that Chavers could state a claim that prison officials had violated his due process rights by confiscating his law books.

While an intentional but unauthorized property deprivation cannot be challenged in federal court as long as adequate state remedies exist, an authorized and intentional confiscation may be challenged under § 1983 in federal court.

In this case the court relied on Wisconsin DOC rules which authorize only Bibles and Korans as permitted books. It thus held that Chavez may not have been afforded due process to challenge the DOC policy prohibiting prisoners from possessing their own law books and legal materials. These claims were authorized by the court to proceed. See: *Chavers v. Abrahamson*, 803 F. Supp 1512 (ED WI 1992).

Wisconsin Lacks Adequate State Remedies for Due Process Violations

Varees Smith is a Wisconsin state prisoner. He was infracted for allegedly charging another prisoner to do legal work. He filed suit under § 1983 claiming his due process rights were violated when a disciplinary hearing was held without notice and he was not allowed to present witnesses or evidence on his own behalf.

The defendants sought to dismiss Smith's complaint on the grounds that it failed to state a claim for which relief could be granted. The defendants claimed they could not be sued in federal court because even if Smith had been deprived of his due process rights to remain out of segregation without a constitutionally adequate hearing, he had an adequate remedy for relief under Wisconsin state law.

The district court gives a detailed examination of the U.S. Supreme Court cases concerning prisoners' rights to sue for due process violations. The district court ruled that *Zinermon v. Burch*, 494 US 113, 110 S.Ct. 975 (1990), does not allow state officials to escape liability for failing to provide constitutionally required due process safeguards merely by pointing to state remedies.

In this case the district court specifically examines the Wisconsin state remedy available to prisoners wrongfully placed in segregation. The remedy, called state law certiori, only allows for expungement of the conduct report and does not permit recovery of money damages. The district court agreed with another federal district court in Wisconsin, *Sturdevant v. Haferman*, 798 F.Supp. 536 (ED WI 1992), that this Wisconsin state law remedy is not adequate. Thus, Wisconsin prisoners can continue to sue state prison officials in federal court for violation of their due process rights. See: *Smith v. McCaughtry*, 801 F. Supp. 239 (ED WI 1992).

Infraction Suits must Exhaust Administrative Remedies

L. Markham is an Indiana state prisoner. He lost 243 days of earned good time in a series of disciplinary proceedings. Under Indiana DOC regulations prisoners can appeal the loss of good time credits to prison officials within 10 days of the hearing, which Markham did not do. Indiana state law provides no judicial forum for prisoners to contest the decisions of prison disciplinary boards. Their only avenue of relief, when good time is at stake, is via federal habeas corpus.

Markham filed a petition of habeas corpus in federal court seeking return of his good time credits. The district court dismissed the petition holding that by failing to appeal the rulings administratively, Markham had waived his claims. The court of appeals for the seventh circuit affirmed.

The appeals court held that 28 U.S.C. § 2254, the federal habeas corpus statute which requires the exhaustion of state judicial remedies before allowing a petition in federal court, also requires exhaustion of state administrative remedies as well, even though the statute does not say any of this. The court interprets the word "courts" in § 2254 to "...embrace any tribunal that provides available and effectively corrective process." It is not the concern of the federal courts how the states divide adjudicative functions between courts and agencies. The court states that federal courts should not intrude into relations between the states and their prisoners until the state has a chance to correct its errors.

The court held that because Markham had not administratively appealed the disciplinary board ruling he had forfeited his right to seek judicial review. The only difference, according to the court, between forfeiture in this case and forfeiture in other habeas cases involving exhaustion of state remedies is that here the state forum is administrative and not judicial. The court notes this is the first time a court has held that prisoners must administratively appeal the decisions of disciplinary boards before being able to challenge the decision in court. See: *Markham v. Clark*, 978 F.2d 993 (7th Cir. 1992).

Nominal Damages Awarded in Prison Rape Case

Four Missouri state prisoners were repeatedly raped by other prisoners. Before and after the rapes they were unable to check into Protective Custody (PC). They filed suit against prison officials claiming the rapes violated their eighth amendment rights. After a trial, the jury awarded the plaintiff's nominal damages of $1. The court awarded the plaintiffs $95,000 in attorney fees. Both parties appealed.

In a 7 to 6 decision the court of appeals for the eighth circuit affirmed in an *en banc* hearing.

The court held that the jury could have reasonably awarded nominal damages because the plaintiff's actions, and not the defendants' unconstitutional conduct, caused many of the injuries. The dissenting opinion is highly critical of this part of the ruling. The dissent notes that in prison eighth amendment cases, with the high standard requiring actual injury, intent by the defendants, etc., that "nominal damages are, in effect, impossible in prison assault cases for the injuries suffered in those cases are 'too obvious to address.'" The dissent believes that nominal damages constitute a miscarriage of justice requiring a new trial.

The court upheld the finding of liability against the prison warden because the warden did not warn prisoners of the risk

Continued on next page...

of sexual assault, prison staff were not trained or instructed on how to handle or prevent sexual assaults, and of more than 100 rapes in a three year period none were referred for prosecution and almost none were assigned to the prison investigator. PC was also not readily available upon request.

The court also held the warden was not entitled to qualified immunity because the law was clear at the time that prisoners and prison officials are liable if they are deliberately indifferent to or act with reckless disregard of that right.

The court upheld the denial of injunctive relief because none of the plaintiffs had been raped since 1989. Injunctive relief was also not appropriate because the warden lacked the authority to change procedures centrally decided by the DOC. The award of attorney fees was upheld. See: *Butler v. Dowd*, 979 F.2d 661 (8th Cir. 1992).

State Liable for County Jail Overcrowding

Jail prisoners in the Harris County Jail, Texas, filed suit against county and state officials claiming that overcrowding at the jail violated the eighth amendment. The district court found that it did and that both state and county officials had acted with deliberate indifference towards jail prisoners.

The defendants appealed and the court of appeals for the fifth circuit affirmed the lower court rulings.

The appeals court notes that the states do not enjoy qualified immunity protection. The court upheld the liability finding against the state by holding that the state's refusal to accept convicted prisoners for transfer to state prisons was the cause of the jail's overcrowding. The court rejected the state's defense that a lack of funding for the state's prisons, which are seriously overcrowded, had caused it to not accept the jail's convicted prisoners. The court notes that if the state expands its prison facilities the early release of prisoners will not be needed to relieve overcrowding.

The court also upheld the finding of deliberate indifference by, and liability of, the county defendants.

The defendants claimed that the district court's imposition of a population cap on the jail was an overly intrusive remedy and thus an abuse of discretion. The appeals court rejected this argument by holding that a numerical cap on the number of prisoners gives the county maximum flexibility in how it wants to meet the population goals. See: *Alberti v. Sheriff of Harris County, Texas* 978 F.2d 893 (5th Cir. 1992).

Blind Pretrial Detainees Entitled to Treatment

Anthony Harris was a pretrial detainee in the Cook county jail (Chicago). He is legally blind. While at the jail he repeatedly requested medical treatment for his blindness and frequent eye infections. He also requested special handicapped housing to prevent dangerous situations. Jail officials ignored his requests. As a result he was never provided with any medical treatment and suffered from eye infections. Being unable to protect himself he was beaten by jail staff and prisoners. Harris filed suit claiming violation of his eighth amendment rights.

The defendants moved for dismissal on grounds Harris had failed to state a claim and that he failed to properly serve some of the defendants with the complaint. The district court granted their motion in part and denied it in part.

Finding one of the defendants had not been properly served within 120 days of the complaint being filed the court dismissed the defendant from the suit without prejudice, giving Harris an opportunity to properly serve him.

The court begins by noting that pretrial detainees are protected from mistreatment by the due process clause of the constitution, not the eighth amendment. The court gives a good discussion of the elements that must be plead to properly state a constitutional violation for deprivation of medical treatment. Using that standard the court held Harris had properly stated a claim upon which relief could be granted.

The court dismissed some of the supervisory defendants because Harris had failed to allege their personal participation in or knowledge of the violations.

In declining to dismiss the jail guard defendants the court discusses detainee's right to medical treatment and to be protected from harm. The court held Harris had properly alleged such violations. See: *Harris v. O'Grady*, 803 F. Supp 1361 (ND IL 1992).

Damages Awarded to HIV+ Jail Prisoner

Louise Nolley is an HIV+ prisoner held in the Erie County Jail in New York. She filed suit under § 1983 contending that various jail practices violated her rights. The objectionable practices included: automatically segregating HIV+ prisoners; denying HIV+ prisoners law library and religious service access; and placing red stickers on the files and records of HIV+ prisoners. In a preliminary ruling, at 776 F. Supp 715 (WD NY 1991), the district court had found the defendants had violated a number of Nolley's rights but did not order relief at that point.

In this opinion the court awards Nolley extensive damages finding that the county, sheriff, jail warden and jail nurse were all responsible for the statutory and constitutional violations. The court awarded Nolley $20 per day for mental distress and $10 per day in presumed damages for each of the 310 days the jail kept red stickers, denoting her HIV status, on her files. The court gives an extensive discussion of the right of privacy and damages as a remedy for privacy deprivations.

The court ruled the jail's policy of automatically segregating HIV+ prisoners was unconstitutional and violated Nolley's due process rights. The court held that the policy was irrational and not reasonably related to any legitimate penological concerns where the defendants knew HIV cannot be spread through casual contact and Nolley was not assaultive or aggressive. The court gives a good discussion of damage awards in wrongful segregation cases and explains its award to Nolley of $125 per day for each of the 310 days she was segregated.

The court awarded nominal damages on Nolley's denial of law library access because, while the denial was unconstitutional, she could not show any adverse effects.

The court awarded $10 in damages for each of the 35 religious services Nolley was prohibited from attending.

The court provided a good discussion on the award of punitive damages against supervisory staff. The court awarded Nolley $20,000 in punitive damages against the jail warden.

The court also awarded Nolley $87,000 in attorney fees and costs. See: *Nolley v. County of Erie*, 802 F. Supp 898 (WD NY 1992).

DOC Phone Rip Off

By Paul Wright

On March 16, 1992, the Washington DOC signed a contract with AT&T (American Telephone and Telegraph) for the latter to provide telephone services to all the prisons in the Washington prison system. AT&T in turn has subcontracted with three Local Exchange Companies (LEC's) to provide local telephone service.

The contract covers two types of LEC public telephones. One is services for prisoners who can only make collect calls. The others are public phones for use by staff and visitors which can make collect and pay calls.

The subcontractors and the facilities they service are: GTE for the Washington State Reformatory, Twin Rivers, Indian Ridge and the Special Offender Center. PTI does Clallam Bay, Purdy, Olympic CC, Pine Lodge Pre Release and Coyote Ridge. USWC does Shelton, Walla Walla, McNeil Island, Airway Heights, Tacoma Pre Release, Cedar Creek and Larch.

The DOC does not own the telephone monitoring and recording equipment it has installed. Rather, as part of the contract each telephone company is being contracted to provide and maintain: public telephone sets, all associated equipment, lines, dictaphone recording/monitoring equipment, call timing and call blocking software. Title to all the phones, recording equipment, etc., remains with the contractor. The DOC has agreed to defend against any and all litigation challenging the contractor's provision of call recording and call monitoring equipment. That provision will extend beyond the actual life of the contract, which is for five years.

Each contractor provides the superintendent of each prison with a monthly report that details, by institution, the date, time, payphone number, called number and length of each call made from a prison telephone. Using this information prison officials can target specific phone numbers called or dates and times to choose which calls to listen to after they have been recorded. The Washington DOC policy on phone recording, DOC Policy 450.200, states that the tapes of all phone calls will be maintained for at least a one year period.

With regards to the kickback that the DOC receives from prisoner phone calls the contract states: "7.A In return for the right to provide Inmate and Public Telephone Service under this agreement, Contractor GTE, PTI and USWC shall each pay to the department on a monthly basis the commissions set forth in attachment 1 to this agreement. Each carrier's monthly commission checks shall be sent to the superintendent of each covered correctional institution or work release program, made payable to the Inmate Welfare Fund, unless and until the Department shall specify a different payee for the carriers commission checks."

The commission rates that the contract specifies is 24% of billed revenues from calls carried by ATT, 27% for those calls carried by GTE and PTI, and a whopping 35% for all calls carried by USWC. Needless to say, the telephone companies aren't giving the DOC these commissions out of their profit margin, rather they are adding this on as a surcharge to what they bill the people we call.

The contract states that it is the responsibility of the contractor to abide by the rates established by the FCC (Federal Communications Commission). I've done some preliminary research into this matter and it seems that 47 U.S.C. § 202-207, which prohibits telephone carriers from discriminating among their clients and charging them more, would provide a means by which to challenge this. 18 U.S.C. § 2510 and 2511, limit the conditions in which phones can be tapped or recorded by the government. The law applies to prisons, See: *Kimberlin v. Quinlan*, 774 F. Supp 1 (DC DC 1991); *United States v. Amen*, 831 F.2d 373 (2nd Cir. 1987); but has been held not to apply to prisoners' calls because prison officials are considered law enforcement personnel. See: *United States v. Noriega*, 917 F.2d 1543 (11th Cir. 1990); *Lee v. Carlson*, 645 F. Supp 1430 (SD NY 1986).

My thinking is that a challenge to both the extortionate surcharge and the monitoring would have to be brought by the outside person receiving the phone call. As a matter of standing the prisoner making the call is not affected because they don't pay the phone bill and are not being provided with the service. Thus the prisoner does not have standing to challenge the practices. There are other issues as well such as the outside person's right to choose the carrier that carries the call, etc. The outside people can challenge the fact that their right not be charged discriminatory prices under 47 U.S.C. § 202-207 is being violated by this practice. They can also assert their right to privacy under the fourth amendment concerning the telephone recording/monitoring. All the published cases that uphold prison officials recording of prisoner calls have been brought by a prisoner. None have been filed by the free person being called.

To get the applicable telephone rates, which are centrally filed with the government, write to: Federal Communications Commission, Common Carrier Bureau, 1919 M St. N.W. Washington D.C. 20554 (202) 632-6910. Ask for the rates applicable for your area, the company in question, etc.

While the phone company or DOC being sued on this issue would argue that by accepting a collect call from a prisoner the person being called is consenting to being recorded that type of reasoning has been rejected by courts dealing with free world visitors to prisoners being searched. See: *Thorne v. Jones*, 765 F.2d 1270 (5th Cir. 1985); *Daugherty v. Campbell*, 935 F.2d 780 (6th Cir. 1991); *Marriot by and through Marriot v. Smith*, 931 F.2d 517 (8th Cir. 1991). The courts have held that forcing a person to choose between a search that violates the fourth amendment and being allowed to visit their loved one in prison is not a "choice" at all and thus is not a valid consent. The same argument and reasoning can be applied to the phone recording issue: that a "choice" between talking to their friend or family member on the phone or consenting to a search and seizure of the telephone conversation by government officials is no choice at all and thus not a valid consent.

The supreme court has held that both federal wiretapping statutes and the fourth amendment require particularized suspicion that someone has committed a crime when a non prisoner's phone is recorded or monitored by government officials. A court order authorizing the tapping is also required. See: *United States v. Donovon*, 429 US 413, 97 S.Ct. 658 (1977). Obviously the free person being called by the prisoner is the party who has to assert this right.

At least one court has held that charging prisones ' families excessive phone rates is unconstitutional. See: *Tuggle v. Barksdale*, 641 F. Supp 34 (MD TN 1985). But that seems to be an isolated ruling. I think the best results will likely be obtained by an outside person challenging the pricing scheme on statutory grounds and asserting their fourth amendment rights against the recording. I am interested in hearing from anyone who has litigated this issue or who has any ideas.

From the Editor

By Paul Wright

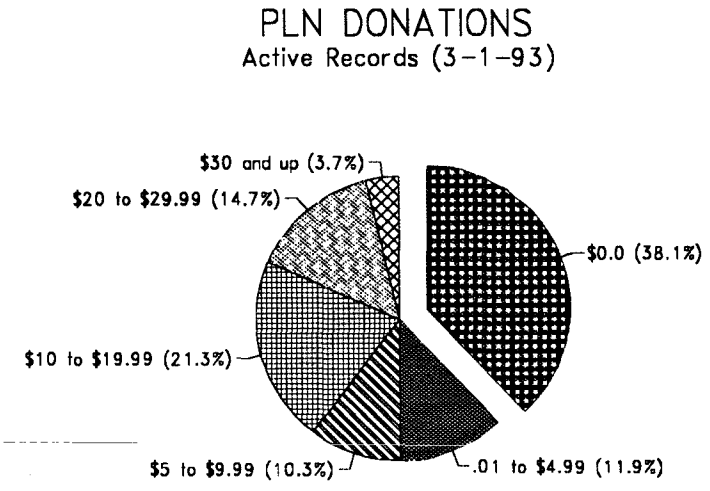
Welcome to another issue of *PLN*. We are still working on our 1994 prison calendar and we still need graphics and drawings. Any prison artists interested in participating should send us a copy of their work for us to check out, if we want to use it we will then contact you about getting an original or a better copy. The calendar will be in black and white and the graphics will be in a landscape format, horizontal 11 by 8½. To have it available in time for the new year we need to have it at the printer by September. Anyone interested in participating should contact Ed or myself.

Recently we went through our mailing list to find out how many were supporting subscribers. This is the first time we'd done this and the results kind of surprised us. A little more than 38% of our readers are getting free subscriptions and another 12% have donated less than $5.00. So all told, slightly more than half our readers have donated less than $5.00 (see accompanying graph). Most of the non-donors are prisoners.

We don't expect prisoners in control units or on death row to make donations (but if you can afford it feel free to do so) because of the difficulty in earning money on lockdown. But we do expect prisoners in population and free people to donate. It costs us about $.50 to print and mail each issue of *PLN*. Those are pretty much our only expenses, no one at *PLN* gets a salary, we have no overhead because everything is done by volunteers. All we want is for people to try to cover the cost of their subscription. All donations, no matter how small, help. When we get letters from prisoners in population who state they find *PLN* useful and informative but that they can't make any donation whatsoever I wonder how useful we can be if they can't hustle up a few stamps to cover subscription costs.

The reason I bring this up now is that while *PLN* has more readers than ever before many of the new additions are indigent and have not donated. At the moment we can afford to provide complimentary subscriptions and can do the occasional extra big issue like last month's *PLN*. But we see *PLN* as a long term project. *PLN* fulfills a need not met by any other publication and we want to continue meeting those needs and we will do so as long as the project pays for itself. We try not to let money concerns interfere with our operation, we've never turned anyone down for a subscription if they were indigent, in a control unit, down on their luck, etc. But at some point if the current trend continues and the non paying subscribers continue to increase in proportion to paying subscribers we will no longer be breaking even, it will start costing us more money to print and mail *PLN* than we take in from donations. That will necessitate our starting to cut non-donors from the mailing list. You, our readers, are our only source of income. We don't have any big money sponsors, we don't sell advertising, and our politics pretty much cut us off from grants and such from the poverty pimp foundations (we have already tried that, unsuccessfully). Financial independence also means that we answer only to you, our readers. My dad says that whenever people give you money (lots of it) they expect you to think like they do. Well, we aren't going to change our way of thinking, or *PLN*'s editorial line, just for money. But that doesn't mean we don't need money. To make a long story short, if you haven't made any donations or aren't covering the cost of your subscription and you have the means to do so, please send us a donation.

One means that prisoners can use to make *PLN* accessible to more readers, and help subsidize our indigent subscriptions, is to encourage their library or law library to subscribe to *PLN* at our institutional rate of $25.00 a year. We can provide invoices with our federal tax number and other information on request. If you know of anyone interested in what *PLN* has to say encourage them to subscribe. We can provide you with subscription forms on request. Enjoy this issue and pass it along when you're done with it.

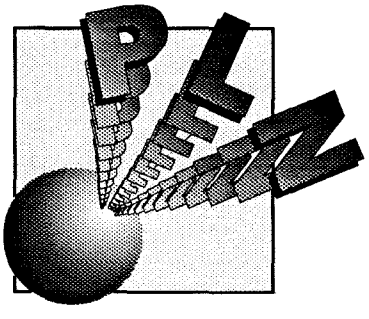


AT&T Exploits Prison Labor

The phone company has found a way to dump union workers, save big money and exploit the labor of prisoners, all at once. According to reports from the Communications Workers, AT&T is contracting out telemarketing jobs to firms that provide labor practically free through the prison system. The company is planning to lay off thousands of telephone operators — all union members who could perform the telemarketing work. Prisoners, of course, have no option about performing work they are assigned.

What do the AT&T subcontractors pay prisoners for telephone work? Try $2 per day. For that, the prisoners — essentially slave laborers — have to call area businesses, identify themselves as AT&T representatives and try to sell AT&T products and services. The prison systems in Colorado, Oregon, Arizona, New Mexico, Ohio, New Jersey and Florida sell the right to exploit prisoners to a firm called Unibase, which in turn sells the service to AT&T.

From: *Workers World*



Peruvian Political Prisoners Mistreated

By Paul Wright

In past issues of *PLN* we have reported on events in Peru affecting the political prisoners of the Communist Party of Peru (PCP). In May of 1992 the Peruvian government stormed the Canto Grande maximum security prison killing and wounding dozens of PCP prisoners; many were killed after surrendering to government forces (See Sep. 1992, *PLN*). After the prison massacre the government transferred the POWs to prisons and military bases across the country. Since the massacre (which was only the latest of several) the POWs living conditions have deteriorated dramatically.

Recent reports from Peru indicate that on November 26, 1992, several truckloads of troops entered the Santa Monica prison in Lima and attacked the prisoners. The number of dead or wounded is unknown because the government refuses to allow lawyers, human rights groups, the red cross or family members to enter the prison.

On November 22, 1992, two guards and two prisoners were reported killed in unknown circumstances at the prison in Puno. The prisoners at Puno are being subjected to especially barbaric treatment. Members of the delegation sent to Peru by the International Emergency Committee to Defend the Life of Chairman Gonzalo denounced how the military dictatorship has initiated a new extermination of prisoners of war:

> " ... the prisoners accused of belonging to or supporting the PCP have been transferred to the recently opened prison on an Air Force base in Puno, a city near Bolivia, where the temperature reaches 10 degrees below zero Celsius. The description of living conditions in this prison, provided by lawyers and prisoners family members, can only be called barbaric and violating all fundamental human rights: chained 23 hours a day, limited access to sunlight for only an hour a day, being subjected to torture and beatings, they are forced to remain naked for long periods of time. Their food consists of a piece of bread and a glass of water in the morning and a watery rice soup in the evenings. Tuberculosis and other illnesses are very common and the prisoners are forced to sleep on bare concrete floors. It is difficult for them to see their lawyers and the infrequent visits from their immediate family members, who must travel for days to reach the prison, can only last 10 minutes."

On their part the prisoners' relatives denounce the fact that the prisoners are denied the most fundamental human rights. They are not provided with either medical attention nor medicines. They are denied the right to nutrition, "giving them one meager meal a day, mixed with glass and kerosene, they have prevented their families or friends from giving them any type of nutritional assistance or any other type of assistance." This is in the context that in all Latin American countries it is customary for prisoners' families to provide food, clothing and other items to their imprisoned relatives.

Since the capture of PCP chairman Guzman in September of 1992 the war has only intensified. The PCP has continued and increased its attacks on the government. For its part the government is seeking to impose the death penalty, retroactively, on members of the PCP because of their membership, real or alleged, in a "terrorist" organization. After the Peruvian Bar Association denounced the torture of PCP Central Committee member Marta Huatay, who is a lawyer and was captured with Guzman, the government banned the Bar Association for being "apologists for terrorism!"

Alfredo Crespo, the lawyer who represented Guzman at his secret military kangaroo trial has been arrested as have several other lawyers who represent PCP prisoners. Dr. Crespo was charged with "treason" because he is Mr. Guzman's attorney. Within four days of his arrest Dr. Crespo had been "convicted" by a secret military tribunal of hooded judges and sentenced to life in prison. Other lawyers who represent PCP prisoners have been murdered by right wing death squads or wounded in assassination attempts. Several other lawyers with political prisoners as clients have also been arrested. The government has also passed a law which prohibits lawyers from representing more than one client accused of political offenses. This has the effect of denying counsel to most defendants accused of being revolutionaries. To put this into context, there aren't that many lawyers to begin with in most non-industrialized countries, and when the lawyers run the risk of being killed or arrested for representing clients at odds with the government the pool of available counsel shrinks even further. In any case, with secret military tribunals trying all political cases there is little lawyers can do for the accused beyond act as impotent witnesses to the judicial charade. But Peru isn't the only place this occurs in.

Chairman Guzman has been held in solitary confinement since his capture and has been denied all contact with his attorneys, doctors and human rights monitors. In fact,. no one aside from his captors has seen Mr. Guzman since his capture. Recent reports state he has lost some 50 pounds since he was captured. Guzman had been held captive on an island near Lima, he has since been transferred to an underground prison on a military base on the mainland. There are serious concerns that his life is in grave danger from the Peruvian government.

We are unable to report on these events as frequently or in as great detail as we would like to due to space constraints in *PLN*, timeliness of the material and the sheer volume of information. Even if we restrict our coverage to events affecting only the prisoners in Peru there is a lot to cover because the government seems to commit a new outrage every day. I suggest that readers interested in events in Peru subscribe to: *Bulletin of the International Emergency Committee to Defend the Life of Abimael Guzman*, 27 Old Gloucester Street, London, WC1N 3XX, England. *MIM Notes* P.O. Box 3576, Ann Arbor, MI. 48106; *El Diario Internacional*, P.O. Box 1246, Berkeley, CA. 94701. All of these give regular detailed coverage of events in Peru.

Prison Riot Crushed in Venezuela

On January 12, 1993, Venezuelan police used tear gas to quell a riot in Fort Tiuna of about a hundred soldiers and civilians, who were tried for rebellion for their participation in a November 27, 1992, coup attempt. The riot was crushed with tear gas by police and Virginia Contreras, defense lawyer to some 20 of the imprisoned soldiers, said she also hear shots. All journalists were ejected from the scene.

According to Radio Caracas, at least 180 of the 240 people tried in relation to the Nov. 27 coup attempt were sentenced and the rest absolved. 180 rebels got sentences of 18 to 20 years. The maximum sentence in Venezuela is 30 years.

Source: *Weekly News Update*

Letters From Readers

"Article Clarification" Revisited

In response to J.D., Lompoc CA, "Article Clarification" Vol. 3 # 12, December 1992:

I understand J.D. being pissed off about 80% of the population not taking part in the strike. But when I think back to all the strikes I took part in since the '60s, I was in Lompoc then F.C.I., at the best of times 40% would be involved in a strike, and I took part in all of them. Even so convicts brought about change in the prison system. The trend towards more or total control of prisoners has made change all the more difficult to achieve by prisoners. The new breed of wannabes that J.D. made reference to has created a more serious problem that probably has no cure. They have no idea of convict values. So what do us convicts who give a shit about our rights do. We do whatever we can even if it's only 20% of us. The times they are a changing and we have to make adjustments to the changes. There is more than one way to skin a cat. We are already using some of them with litigation in the courts, pressure on legislatures, more outside involvement, there has to be more all of this plus the tactics used in the past. I would like to say to J.D., brother there are still those of us who care and never quit till we have justice. Don't get discouraged, don't give up the fight for right. Just like you I am living in a wannabe joint.

R.K., McNeil Island, WA

New Video Tape Available

Last October over a thousand people attended the International Tribunal of Indigenous Peoples and Oppressed Nations in the USA. The event, sponsored and organized by a coalition of 30 organizations, was part of the counter-Columbus quincentennial activities throughout the country. The Tribunal put the U.S. Government on trial for internationally recognized crimes such as genocide, colonialism, and the holding of political prisoners. The aims of the Tribunal were to destroy the myth of Columbus as the embodiment of the European Spirit of Adventure and rugged individualism; to provide a forum for a broader understanding of the right of self-determination for Native Americans, Puerto Ricans, New Afrikans (Blacks) and Mexicans; and the immediate, unconditional release of the Political Prisoners and Prisoners of War presently in the U.S. prisons and jails.

A 60 minute video has just been produced that covers the various events surrounding the Tribunal. It is called *USA On Trial.* To order copies of the video send $20.00, which includes postage and handling, to Mission Creek Video, P.O. Box 411271, San Francisco, CA 94141-1271. The published verdict of the Tribunal is also available from the American Indian Movement in English or Spanish. Please send $4.00 (indicate which language) to American Indian Movement, 2017 Mission Street # 303, San Francisco, CA 94110.

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Prison Legal News

Working to Extend Democracy to All

Vol. 4, No. 5 May 1993

Search Victory for Women Cons

By Gini Faller

The long-awaited decision in *Jordan v. Gardner, et. al.* came down on February 25, 1993. The Ninth Circuit, sitting *en banc* held 7-4 that cross-gender non-suspicion clothed body searches violate the 8th Amendment:

> In this case we are presented with the prospect of serious psychological suffering, the infliction of which is demonstrably 'unnecessary' and, in the constitutional sense of the word, 'wanton.' The 'standards of decency in modern society' do not permit the imposition of such needless harm. [Citation ommitted]
>
> *Jordan v. Gardner*, _F.2d 1387, 1409 (1993), 52 Cr.L. 1556.

In July, 1989, the Washington Corrections Center for Women (WCCW) instituted a policy where, for the first time, male guards conducted non-emergency searches of female inmates. At the same time, searches became random and were much more intrusive than ever before. Searches became cross-gender because of the guard's union's claim that the same sex limitation was discriminatory **even though** every member of the prison's own mental health staff warned that, because 85% of the inmates had suffered abuse at the hands of males, these searches were apt to trigger severe psychological trauma.

The policy was only in effect for a couple of hours before U.S. District Court Judge Tanner gave the prison the choice of either suspending the practice or having him issue a temporary restraining order which had already been requested by three inmates! In that short time, at least one victim suffered a severe disassociative reaction and another woman, who was not searched herself, but merely watched a cross-gender search, completely broke down.

The inmates contacted many attorneys and groups and soon MacDonald, Hoague & Bayless agreed to represent them. The inmates added the two women who had suffered the worst reactions as plaintiffs. Although the TRO was soon in place, WCCW announced its plans to institute the searches against all non-plaintiff inmates. That forced the suit to become a class action.

District Court Judge Bryant tried the case on an accelerated schedule and granted the permanent injunction, finding that the practice violated the inmates' 1st, 4th and 8th amendment rights. The Seattle Chapter NLG was one of 15 *amici* who signed onto a brief in support of the women's 4th and 8th amendment claims authored by the Northwest Women's Law Center. The ACLU also submitted its own brief.

The 9th Circuit originally reversed the district court in a 2-1 (Judge O'Scannlain dissenting) decision. *Jordan v. Gardner*, 953 F.2d 1137, *reh'g en banc granted*, 968 F.2d 984 (9th Cir. 1992). In the rehearing, the Court did not reach the 4th or 1st Amendments, stopping its analysis with the 8th Amendment. The court held that in evaluating a policy which was developed over time, the requisite wantonness of prison officials is determined by the 'deliberate indifference' standard rather than the 'malicious and sadistic' standard urged by the State. Judge O'Scannlain wrote, in the majority opinion:

> It is not enough to say that before enacting a policy prison authorities considered an issue carefully. That is only one part of their obligation. Prison authorities are also required to afford sufficient weight to the constitutional rights of individuals. The failure to treat constitutional provisions with appropriate indifference to the rights the policy seeks to limit. ...No matter how much thought and consideration the superintendent gives to the problem, his failure to place a higher value on a prisoner's life than on the staff's morale will constitute 'deliberate indifference.' *Jordan v. Gardner*, at 1405.

There were two concurring and two dissenting opinions. Any one who is interested in prison law should read the entire decision.

Rumor has it that the Department of Corrections wants to take this case up to the U.S. Supreme Court. One hopes that Governor Lowry will remember his statement on September 10 when, as Candidate Lowry, he said that he would not support a cross-gender search policy at WCCW. As the DOC and the State of Washington ponder the question of whether to appeal the decision, the question asked by Judge Noonan in his concurrence (*Jordan v. Gardner*, at 1436) seems especially relevant:

> How did a civilized country and a civilized state like Washington get in this fix where it takes federal judges to tell a responsible state official to stop his approval of indecency because he is violating the Constitution?

From: *NLG Briefs*

Sexually Harassing Pat Searches May be Illegal

Two Missouri state prisoners filed suit against a female prison guard. In their complaint they alleged that for a two month period the guard fondled their crotches during almost daily, routine pat down searches. After they told the guard they wanted to be searched by male guards she retaliated by citing them for false disciplinary violations. When they refused to be searched by the guard they were placed in segregation.

The district court dismissed the suit upon the guards' motion for summary judgement. The district court held that the prisoners had made broad, conclusory allegations of sexual harassment while the guard denied any improper conduct.

The appeals court for the eighth circuit reversed and remanded. The appeals court held that an issue of material fact, requiring resolution at trial, exists as to whether the plaintiffs were subjected to sexually harassing, physically intrusive pat down searches. The prisoners complaint contains sufficient allegations (time, place, manner of searches, complaints to prison officials, etc.) to avoid being "broad and conclusory." The court notes that while pat down searches of prisoners are permissible, such searches violate the fourth amendment if they are conducted in an unreasonable manner. See: *Watson v. Jones*, 980 F.2d 1165 (8th Cir. 1992).

ACLU Challenges NJ DOC Censorship

The Newark, NJ, law firm of Crummy, Del Deo, Dolan, Griffinger and Vecchione, acting on behalf of the New Jersey ACLU, has filed a class action law suit challenging the censorship of political publications by New Jersey prison officials. The law suit, *PSC Publications, et al., v. Fauver, et al.*, was filed in Middlesex County Superior Court and includes state law and federal law claims.

The suit states that New Jersey DOC officials have a practice of systematically censoring and confiscating all issues, regardless of specific content, of certain political publications. The publications affected include: *Prison News Service, MIM Notes, Love and Rage, The Black Panther* and *Arm the Masses*. Prison regulations state that if a publication is censored the objectionable portion should be removed and the remainder delivered to prisoners; this is not done, instead the whole publication is censored.

The plaintiffs include several prisoners located in Trenton and Rahway as well as the publishers of several of the affected publications. The defendants are various New Jersey prison officials. As a class action suit the complaint asserts the rights of all New Jersey state prisoners being affected by this pattern and practice of censorship.

The suit maintains that the DOC's policy of blanket censorship of all leftist, progressive and nationalist publications violates the federal first amendment as well as the New Jersey state constitution. The DOC has failed to provide notice to both the prisoners and the publishers of when the publications are seized, the reasons for the seizure and an opportunity to appeal. They have routinely ignored their own regulations in all these areas.

The issue of prison censorship is an important one that affects all prisoners. *PLN* is especially interested in this area and would like to hear about these challenges to censorship. We will keep you posted on the outcome of this litigation.

Prison Rule Banning Media Mail/Visits Held Unconstitutional

Sabil Mujahid is a Hawaii state prisoner. He filed suit under § 1983 claiming that Hawaii prison regulations which prohibit prisoners from visiting or corresponding with members of the media, unless they knew each other on a personal basis prior to incarceration, were unconstitutional.

The district court granted summary judgement to Mujahid. The court employed the heightened scrutiny of prison rules announced in *Procunier v. Martinez*, 416 US 396, 94 S.Ct. 1800 (1974), to find that the Hawaii prison rules in question were unconstitutional. Even employing the more restrictive *Turner v. Safely* standard the court held the rules in question were still unconstitutional.

Despite its ruling the court granted prison officials qualified immunity from money damages by holding prisoners' rights to communicate with the media were not clearly established law for immunity purposes. See: *Mujahid v. Sumner*, 807 F. Supp. 1505 (DC HI 1992).

Comic Book Censorship Overturned

Everett Lyon is an Iowa state prisoner. He ordered several religious comic books which prison officials censored claiming they would be "disruptive and produce violence" because they were allegedly "anti-catholic and blatantly bigoted." After exhausting his administrative remedies Lyon filed suit under § 1983 claiming violation of his first amendment rights.

The district court found that the censorship of Lyon's comic books was arbitrary and capricious because one of the censored publications also appeared on the prison's approved publications list. Salman Rushdie's book *Satanic Verses* (which has resulted in a multi-million dollar contract being placed on Rushdie's head, the firebombing of stores selling the book, the murder of people involved in marketing the book, etc.) was available to prisoners in the prison library. None of the defendants could cite a single instance of problems arising from anti-catholic or religious criticism among prisoners.

The court gives an extensive and detailed explanation of the proper standard to be used in evaluating prison censorship. It lists numerous censorship cases that are useful to anyone litigating this issue.

The court upheld the facial validity of the Iowa censorship regulations but held that the regulations, as applied to Lyon's comic books, were unconstitutional.

The court issued an injunction ordering prison officials to deliver the publications to Lyon and gives a good discussion

Continued on next page...

of the court's injunctive powers in prison censorship cases. The court did not award damages because it presumed Lyon had sued the defendants only in their official capacities. The eleventh amendment bars suits against state officials in their official capacities. The court went on to say that even if that weren't the case, Lyon had failed to show he had suffered actual damage. The court did award Lyon attorney fees. See: *Lyon v. Grossheim*, 803 F. Supp 1538 (SD Iowa 1992).

Court Dissolves 1-800 Injunction

Iowa state prisoners filed suit seeking preliminary and injunctive relief against an Iowa prison policy prohibiting them from calling their attorneys toll free 1-800 numbers. They claimed this practice violated their right of access to the courts.

The district court agreed and granted a preliminary injunction. Prison officials appealed and the court of appeals for the eighth circuit vacated and remanded.

The appeals court held that the lower court had abused its discretion in granting the injunction because the prisoners had shown neither irreparable harm nor prejudice from the prisons toll free number policy. Court access is viewed as a whole rather than in parts. The appeals court held that because the prisoners ability to file papers in court, meet deadlines and process litigation was not affected, they were not entitled to a preliminary injunction. The case was remanded back to the lower court for further proceedings. See: *Aswegan v. Henry*, 981 F.2d 313 (8th Cir. 1992).

Unlawful to Read Legal Mail in Prisoners Cell

Robert Proudfoot is a Pennsylvania state prisoner. After anonymous informants stated Proudfoot was selling drugs from his cell, prison guards searched his cell three times in eight days. No drugs were found. During one of three cell searches guards opened sealed and stamped envelopes addressed to a federal judge and read the contents and checked them for contraband. Proudfoot filed suit under § 1983 and the court appointed counsel to represent him.

The court held that prison guards had violated Proudfoot's right of access to the courts by opening and reading his legal mail. The court gives a lengthy discussion of cases concerning the right to receive confidential legal mail. However, the court granted the guards qualified immunity from money damages because neither the third circuit nor the supreme court have squarely addressed the issue, and the guards' actions were not objectively unreasonable. The court held that even if the guards weren't entitled to qualified immunity that money damages would not be appropriate because Proudfoot had not proven he had suffered any damages.

In its conclusions of law the court holds that the first and sixth amendments prohibit prison officials from reading prisoners' outgoing legal mail or to "create the impression that such mail has been read so that the prisoner is chilled from exercising his rights." See: *Proudfoot v. Williams*, 803 F. Supp 1048 (ED PA 1992).

Due Process Protects Detainees from Violence

Raul Valencia is a pre-trial detainee in Brewster County, Texas. During a jail disturbance guards smashed Valencia's head into cell bars, choked him into unconcioussness and, after handcuffing him, beat him. Valencia filed suit under § 1983 claiming this treatment violated his constitutional rights. The defendants sought summary judgement on qualified immunity grounds. After a bench trial the district court denied the defendants qualified immunity, ruled in Valencia's favor, and awarded him $2,500 in damages and $27,600 in attorney fees.

The court of appeals for the fifth circuit affirmed. The court gives a detailed analysis of the constitutional prohibition of excessive force against pre-trial detainees. It holds that the fourth amendment is not appropriate for analyzing excessive force claims once the victim is in custody. Instead, the court holds, the due process clause of the constitution prohibits use of excessive or punishing force against pre-trial detainees unconvicted of any crimes.

The court gives a lengthy, detailed analysis of the test to be used in weighing these claims. The court adopts the Supreme Court tests in *Whitley v. Albers* and *Hudson v. McMillian* (which involved convicted prisoners) to determine if the force used was reasonable.

Applying that standard the court found that jail guards used force maliciously and sadistically to cause harm and were inspired by malice. Thus, Valencia was plainly entitled to judgement in his favor.

Because of that finding the court upheld the denial of qualified immunity to jail officials. The court also rejected the defendants' argument that Valencia's injuries were not serious enough to merit damages. It lists numerous cases finding injuries "sufficient" for § 1983 purposes.

The court announces a new rule for pre-trial detainees alleging excessive force in the context of jail disturbances: whether force was applied in a good faith effort to maintain or restore discipline or if it was applied sadistically and maliciously to cause harm. The standards focus is on the jail officials subjective intent to punish. To determine that intent the trier of fact must consider: the extent of injuries suffered; the apparent need to apply force; the threat reasonably perceived by jail officials, and the need to act quickly and decisively. See: *Valencia v. Wiggins*, 981 F.2d 1440 (5th Cir. 1993).

Improved Jail Conditions Merits Attorney Fee's

Two Wood County, Texas, jail prisoners filed suit under § 1983 claiming the jail had practices of denying prisoners access to the courts, improper classification, punitive isolation without due process, inadequate medical care, denial of reading material and overall unacceptable jail conditions. The district court certified a class of present and future jail prisoners and appointed counsel.

Continued on next page...

A jury heard the individual claims and denied relief, ruling for the state (this despite being told by the judge that the jail conditions were unconstitutional). The judge then denied relief to the class claims. After a remand the district court again denied relief to the class and denied the plaintiffs any attorney fees. In yet another appeal the court of appeals for the fifth circuit affirmed in part, reversed in part and remanded the case.

The appeals court paints a dismal picture of the Wood County Jail: run by untrained staff, raw sewage in showers and bathrooms, repeated violations of state jail standards, a constant state of semi darkness, no access whatsoever to legal materials, only allowing prisoners to read the bible (no other books, magazines or newspapers allowed), arbitrary isolation and denial of visits, among other things.

The appeals court upheld the denial of declaratory relief because jail conditions had improved before the case went to trial thus mooting the case in that respect. The district court also held the defendants had "good attitudes" and the bad conditions raised in the lawsuit were not likely to recur again.

Despite this finding the appeals court states: "...we cannot turn a blind eye to the conditions at the Wood County Jail as they existed prior to the trial date."

In listing the jail's ills the court states that punitive isolation without due process violates the fourteenth amendment. The denial of all access to legal assistance or to a law library violates the prisoners' right of access to the courts. The arbitrary restriction of reading materials to one bible is an unacceptable infringement of prisoners' first amendment rights. The failure to classify prisoners violates the eighth amendment.

In the most interesting part of the ruling, the appeals court held that despite not having prevailed at trial on any of their claims the plaintiffs were entitled to reasonable attorney fee's. The court gives a good discussion of why attorney fee's are appropriate even in a case where the plaintiffs lose at trial.

Because the litigation accomplished its goal of improving jail conditions the plaintiffs were entitled to prevailing party status. The appeals court made this ruling despite a contrary ruling in the lower court. See: *Pembroke v. Wood County, Texas*, 981 F.2d 225 (5th Cir. 1993).

Grievance Procedure Tolls Statute of Limitations

William Gartrell is a Texas state prisoner. He filed suit under § 1983 claiming prison officials conspired to file trumped up disciplinary charges against him in retaliation for his legal activities; the disciplinary hearing and grievance procedure did not comport with due process; and that he was denied an impartial review of the disciplinary and grievance proceedings.

The district court dismissed Gartrell's suit under 28 U.S.C. § 1915 (d) as being "frivolous" because the two year statute of limitations had run on most of the claims. The one claim that was not time barred, the denial of Gartrell's final administrative appeal, did not have a legal or factual basis as a constitutional claim.

Court Enjoins Torture of Jail Prisoners

Two Mississippi jail prisoners tried to escape from the jail by smashing their way out. Their attempt failed and guards secured and restrained them in an interrogation cell. The sheriff questioned the two men as to the location of their escape tools, which had not been used in the attempt. When they did not cooperate he obtained a piece of coaxial cable and began beating them. They told the sheriff the escape tools were in a communal cell.

The sheriff and jail guards ordered the prisoners in the cell to produce the escape tools. When they refused the sheriff and guards searched their cell and found the tools. The sheriff ordered the five prisoners to strip naked from the waist down and whipped them for 10-15 minutes with the cable.

The prisoners filed suit claiming violation of their constitutional rights. They sought an injunction from the court enjoining beatings and torture.

The magistrate judge held an evidentiary hearing. The defendants did not deny or dispute torturing the prisoners. Rather they claimed that jail officials can torture prisoners to coerce information needed to discover contraband or relevant to jail security. The court was not persuaded by this argument.

The court notes that the use of force and torture to extract information from prisoners is prohibited by the constitution regardless of its objectives.

The court granted an injunction enjoining torture at the county jail. The sheriff testified, under oath, that he would again torture prisoners under similar circumstances if he felt a need to do so. The court said this left it no choice but to issue the injunction.

The court gives a detailed explanation of the standard used in preliminary injunctions and why it was granted in this case.

The court also waived the requirement that a security bond be posted by the party seeking the injunction. It also awarded interim attorney fees to the plaintiff. See: *Cohen v. Coahoma County, Mississippi*, 805 F. Supp 398 (ND MISS 1992).

Guard Convicted of Beating Prisoner

As a general rule *PLN* doesn't report criminal cases. This is an exception because it directly pertains to prisoner civil rights and because its so unusual for prison staff to be charged, much less convicted, of assaulting prisoners.

Michael Newman was a jail guard in Providence, Rhode Island. He handcuffed a prisoner who was making noise to the bars of his cell and beat and kicked him. The prisoner suffered injuries to his face, nose, eyes and inner ear and required hospitalization for a week. Newman was indicted, tried and convicted of violating the prisoner's civil rights under color of law and sentenced to 60 months in federal prison with two years of supervised release afterwards.

The court of appeals for the first circuit affirmed the conviction and sentence. See: *United States v. Newman*, 982 F.2d 665 (1st Cir. 1992).

Damages Awarded in PA Beating and Walk

William Giroux is a Pennsylvania state prisoner. He filed suit claiming that his eighth amendment rights were violated when prison guards beat him and made him walk a lengthy distance in manacles and chains, knowing he had a heart condition. After a bench trial the court ruled in Giroux's favor.

In a lengthy description of the factual record the court ruled in Giroux's favor because his testimony was far more credible than that of the guards, who denied all misconduct. The court described one guard's demeanor as having "showed himself to be a combative person with a sneering, almost *Clockwork Orange* mien."

The court ruled the attack and beatings on Giroux and being forced to walk a long distance in chains violated the eighth amendment. The court awarded Giroux $36,000.00 in damages plus attorney fee's. See: *Giroux v. Sherman*, 807 F. Supp. 1182 (ED PA 1992).

DOC Guard Liable for Not Stopping Beating

Roger Buckner is a Missouri state prisoner. He was transported from the Jackson county jail for commitment to the Missouri DOC prison at Fulton. Larry Hollins was a jail guard transporting Buckner. Once at Fulton, Hollins stripped Buckner naked, handcuffed him and then beat, kicked and stomped him. This occurred in a Fulton cell that only DOC guard Robert Veltrop had keys to. Veltrop witnessed the attack and did not intervene. Buckner sued both Hollins and the jail guards who assaulted him and Veltrop for failing to stop the assault, claiming all had violated his eighth amendment rights.

The guards sought summary judgement on the merits as well as on qualified immunity grounds. The district court denied both. The court of appeals for the eighth circuit affirmed.

Veltrop claimed he was not liable because he had no duty or obligation to stop the assault because Buckner was not legally under DOC control yet. The appeals court rejected this argument by noting only Veltrop had the keys to Buckner's cell and that it was Buckner's assignment to the DOC that was the reason he was delivered to Fulton on the day in question.

The court holds that by failing to come to Buckner's aid Veltrop showed deliberate indifference to his eighth amendment rights.

The court denied qualified immunity by holding it is well established law that prison officials have a duty to restore order in a tumultuous situation; that prison officials are liable for deliberate indifference to prisoners injuries and for failing to protect them from foreseeable attacks or otherwise guarantee their safety. The court held that it was not reasonable for Veltrop to conclude it was proper to stand by and watch a naked, handcuffed prisoner be beaten on DOC premises. See: *Buckner v. Hollins*, 983 F.2d 119 (8th Cir. 1993).

Psych Prisoners Have Right of Court Access

Lonnie Hatch is a patient confined in the Arkansas state hospital following his acquittal, by reason of insanity, of criminal charges. Hatch filed suit under § 1983 claiming hospital officials had violated his right of access to the courts by denying him law books, advice from patient advocates, writing materials, stamps and envelopes. After a bench trial the district court ruled in Hatch's favor.

The court held that psychiatric prisoners/patients have a constitutional right of access to the courts just like other confined persons. The court ruled that Arkansas state hospital officials had violated Hatch's right of access to the courts by not providing him with access to a law library, legal materials or assistance from trained legal personnel.

Hatch was unable to show specific damages resulting from the constitutional violations so the court awarded him $10 in nominal damages. The court ordered injunctive relief consisting of the defendants establishing a program of legal access for patients in their custody. The court notes that in fashioning the remedy hospital officials should consider that the use of trained legal personnel may be more advantageous than law library access for patients who have a mental disease or defect which interferes with their right to meaningfully use a law library. See: *Hatch v. Yamauchi*, 809 F. Supp 59 (ED AR 1992).

Organizations Not "Persons" For IFP Status

The Men's Advisory Council is a group of elected representatives of prisoners at a prison in California. When the prison discontinued the practice of providing free tobacco to indigent inmates the Council filed a civil rights complaint in federal court. They sought leave to proceed *in forma pauperis* under 28 U.S.C. § 1915(a). The district court denied the *IFP* motion, holding that there was an inadequate showing of indigency. The Council appealed to the Ninth Circuit Court of Appeals, which ruled in their favor on the *in forma pauperis* issue. The appeals court held that a "person" who may be authorized by a federal court to proceed *in forma pauperis* under § 1915(a) may be an "association" under a definition provided in the Dictionary Act contained in Title 1 U.S.C. § 1. Since prison regulations prohibited the Council from owning property or maintaining a bank account, the court granted them *IFP* status. The state appealed and the Supreme Court granted certiorari.

Writing for the court, Justice Souter held that only a natural person may qualify for granting *in forma pauperis* status under § 1915. This conclusion was reached on the basis of his interpretations of the relevant portion of the Dictionary Act, 1 U.S.C. § 1. That act says:

"The wor[d] 'person'... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."

How does Souter reach the conclusion that the above definition does not include an association of prisoners? The

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bottom line is that he feels there are "sound policy reasons for concluding otherwise."

While permitting artificial entities to proceed *in forma pauperis* may be unwise, and it may be an inefficient use of the government's limited resources, as the dissent points out, there is "nothing in the text of the *in forma pauperis* statute indicating that Congress has chosen to exclude such entities from the benefits of that law." See, *Rowland v. Men's Advisory Council*, ___ S.Ct. ___, 61 LW 4060 (1-12-93).

Unsworn Declarations Admissible

This is a case that will be useful to prisoners in control units or smaller prisons where public notary services are difficult to obtain. Sam Williams is a Michigan state prisoner convicted of murder who was transferred from a max to medium security prison. After a newspaper reported the transfer one of his victim's relatives contacted her congressman who complained to the DOC. As a result of the complaint the prisoner was transferred back to a max prison. Williams filed suit claiming the transfer and a beating he received from prison guards violated his rights. The district court dismissed the suit on summary judgement and the court of appeals for the sixth circuit affirmed.

The appeals court gives a good explanation of how prisoners' complaints, unnotarized but signed under penalty of perjury, are admissible and can place material facts into issue and controvert sworn affidavits. The court gives an extensive discussion of the history of 28 U.S.C. § 1746 which allows the use of unnotarized pleadings and documents in federal court. Thus, either a typed or handwritten complaint sworn under penalty of perjury would have the same effect as a notarized affidavit. See: *Williams v. Browman*, 981 F.2d 901 (6th Cir. 1992).

Prison Officials Liable for Haircuts

Four prisoners at the Iowa State Penitentiary (ISP) with shag haircuts (where the hair is long in back and short in the front and on the sides) were ordered to get haircuts by prison officials. Two of the prisoners agreed to the haircuts, the other refused and were placed in segregation for refusing.

The prisoners filed suit under § 1983 claiming their liberty and equal protection rights were violated. The district court agreed and awarded the prisoners who had been segregated $750 in damages and $300 to the other two and entered declaratory relief in their favor. The court also ruled prison officials were not entitled to qualified immunity.

The court of appeals for the eighth circuit affirmed. The appeals court upheld the lower court's factual findings that the prisoners were never told why they had to cut their hair, that certain white prisoners were allowed to keep their shag haircuts (the plaintiffs are black), that the hairstyles were not gang related as prison officials tried to claim and that prison officials had no legitimate penological interest in ordering the haircuts.

The court notes that the Supreme Court has ruled that citizens have a liberty interest in their personal appearance, *Kelley v. Johnson*, 425 US 238, 244, 96 S.Ct. 1440, 1444 (1976). It also held that ISP regulations created a liberty interest in prisoners' hairstyles.

The appellate ruling is narrow and reiterates that it is only on a review of the district courts factual findings that they are affirming. The district court made numerous findings of fact disputing prison officials' claims of legitimate penological concerns. The appeals court also affirmed the denial of qualified immunity for the same reason. See: *Quinn v. Nix*, 983 F.2d 115 (8th Cir. 1993).

Retaliatory Denial of Parole Actionable Under § 1983

Isa Shabazz is an Oklahoma state prisoner. He filed suit under § 1983 alleging that the Oklahoma parole board has a policy, practice and custom of denying parole to prisoners who choose to exercise their civil rights by suing prison officials. He claimed he was denied parole in retaliation for having sued prison officials for past religious discrimination. The district court dismissed the suit as frivolous under 28 U.S.C. § 1915 (d). The court of appeals for the tenth circuit reversed and remanded.

The appeals court held that the district court erred by weighing the facts in Shabazz's complaint. The district court can dismiss complaints under § 1915 (d) only if they contain clearly baseless factual allegations which are "fantastic or delusional." The district court cannot resolve material disputed factual findings and allegations. "[A] plausible factual allegation, even if it lacks evidentiary support, is not 'frivolous' as contemplated by § 1915 (d), even though it may not survive a motion for summary judgement." See: *Shabazz v. Askins*, 980 F.2d 1333 (10th Cir. 1992).

Confiscation of Legal Materials States Claim

Wayne Zilich is a Pennsylvania state prisoner. When he was transferred from prison to a county jail for court proceedings jail guards confiscated a number of his transcripts, legal materials and papers and refused to return them. Zilich filed suit under § 1983 claiming that the confiscation of his legal materials violated his right of access to the courts. The district court dismissed the complaint for failing to state a claim for which relief could be granted. The district court held that because Zilich could file suit in state court he had an adequate post deprivation remedy which barred a federal § 1983 action.

The court of appeals for the third circuit reversed and remanded. The court begins by noting that access to the court claims can be filed under § 1983. Because the destruction or confiscation of legal materials may violate the right of access to the courts the lower court erred in dismissing Zilich's suit.

The court went on to hold that the existence of state post deprivation remedies did not foreclose a § 1983 claim in federal court. The court held that *Hudson v. Palmer*, 468 US 517, 104 S.Ct. 3194 (1984), does not apply to this type of case. "*Hudson*, however, concerned only the deprivation of prop-

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§ 1983 Proper Remedy for Illegal Confinement

Spencer Parker is a Texas state prisoner. He filed suit under § 1983 claiming he was arrested and indicted for a burglary even though no evidence linked him to the crime. After nine months in jail the charges were dropped and he was released. While in jail he had suffered severe injuries. The district court dismissed Parker's suit as being frivolous under 28 U.S.C. § 1915 (d), the *in forma pauperis* (IFP) statute.

The court of appeals for the fifth circuit affirmed in part, reversed in part and remanded.

The appeals court gives a detailed discussion of the difference between dismissals under § 1915 (d) (frivolous with no arguable basis in fact or law) and Fed.R.Civ.P. 12 (b) (6) (failure to state a claim upon which relief can be granted). The appeals court reviews § 1915 (d) dismissals for abuse of discretion by the lower court.

The district court had dismissed Parker's suit by ruling that because he was challenging the validity of his confinement his only remedy under law was the writ of habeas corpus. The appeals court disagreed. It holds that because Parker is not challenging his *present* confinement he is free to use § 1983 to seek money damages and injunctive relief; in any case, he is ineligible for habeas relief.

The district court also dismissed the complaint by holding that the Ft. Worth Police Department is not a properly named defendant. The appeals court held "though the trial court's legal conclusion may be correct, this conclusion does not constitute a proper ground for dismissing Parker's claim." The proper remedy was for the court to grant Parker leave to amend his complaint and properly name all the defendants. The lower court abused its discretion by not making findings of prejudice to the parties, not alerting Parker to the deficiencies in his complaint and then affording him an opportunity to amend his pleadings.

The appeals court held that Parker's claim that he was falsely arrested and illegally detained for nine months set forth an adequate claim under § 1983. Thus, the district court erred in dismissing the claim. See: *Parker v. Ft. Worth Police Department*, 980 F.2d 1023 (5th Cir. 1993).

Prison Officials Liable for Holding Inmate Past Release Date

Gentry Slone is a Missouri state prisoner. He was sentenced to prison and once in prison his sentencing judge suspended Slone's sentence, effective December 21, 1989, and placed him on probation. The state did not appeal the judges order which then became final and non appealable on December 11, 1989.

Prison officials wrote to the judge to inform him they had decided not to release Slone because they did not believe Missouri statutes authorized his release. The judge told them Slone's release was indeed authorized and that he expected the DOC to execute his order. Eight months after Slone should have been released the court convened a court hearing, had Slone brought to court and released him from the court.

Slone then filed suit under § 1983 contending that prison officials had violated his right to due process. Prison officials sought summary judgement on qualified immunity which the district court denied. The court of appeals affirmed the denial of qualified immunity and remanded the case for trial.

The appeals court gives an explanation of the qualified immunity doctrine. The court held that as soon as the state's judge's order releasing Slone became nonappealable the state lost its lawful authority to hold Slone. Thus, any continued detention violated due process. Slone's liberty interest was clearly established because it was based on a final, nonappealable court order.

The court held it was not objectively reasonable for prison officials to deny Slone his freedom because they disagreed with a final, nonappealable court order. When the state failed to appeal the order prison officials no longer had any discretion over what to do with Slone, they were duty bound to release him.

The defendants argued that they were entitled to good faith immunity because they consulted with counsel before deciding to keep Slone in prison. The court rejected this argument holding that a reasonably competent prison official would know it is not lawful to disobey a final, nonappealable court order. Thus, they were not entitled to qualified immunity. See: *Slone v. Herman*, 983 F.2d 107 (8th Cir. 1993).

Court Bans Double Celling of New Prisoners

Prisoners at the Nebraska State Penitentiary filed a class action suit challenging numerous conditions of confinement at the penitentiary. Most of the claims relate to overcrowding and the overall poor living conditions which include: excessive noise, lack of ventilation, inadequate staff, assaults and violence, contraband rules, lack of privacy, excessive time in cells, double celling, etc. After a lengthy bench trial the court ruled in plaintiffs' favor only on the double celling issue as it pertained to new, arriving prisoners.

The court gives a lengthy factual background of the case and conditions at the penitentiary. It cites numerous cases supporting its rulings on the above issues.

Holding that the prisons' contraband rule (where both cellmates are punished for contraband found in the cells) was not *per se* unconstitutional, the court notes that its application could potentially lead to incorrect guilty findings at prison disciplinary hearings.

The court ruled that prison officials were deliberately indifferent to prisoners' right to safety by double celling newly arrived prisoners with no type of classification or screening. The lack of classification before double celling the prisoners showed a reckless disregard to prisoners' rights.

Despite this ruling, the court went on to grant defendants qualified immunity from money damages. It entered an injunction for the parties to fashion a remedial scheme halting the double celling of new prisoners. See: *Jensen v. Gunter*, 807 F.Supp. 1463 (DC Neb 1992).

Minimum Wage for Cons Studied by Congress

In an effort to reverse a federal court ruling that would allow inmates holding prison jobs to be paid the minimum wage of $4.25 an hour, members of congress and state prison directors have launched an effort to reverse the ruling, in *Hale v. Arizona*, Nos 88-15785 and 89-15162, handed down by the Ninth Circuit U.S. Court of Appeals. The federal Fair Labor Standards Act (FLSA) requires minimum wage payments to employees, with exceptions specified in the law. The law did not list prison inmates as an exception.

If the ruling is not overturned, prison job programs may become too costly to support and will close, leaving idle inmates, risking unrest and violence, and damaging rehabilitation efforts [*Editor's Note: you can see how harmful it would be for us if the state were to pay us something approaching a fair wage*].

Since the ruling mentions such traditional prison jobs as manufacturing license plates, prison officials are concerned that all prison jobs would be affected, including those in prison industry programs which sell goods in interstate commerce, other prison industries jobs and even jobs in areas such as prison laundries, food service and janitorial work.

The ruling would be reversed if the Ninth Circuit court overturned it or by appealing the case to the U.S. Supreme Court. Also, Senator Harry Reid from Nevada obtained a commitment from the Labor and Human Resources Committee of the Senate to hold hearings early this year on his bill, which would create a new exception to the FLSA for prison and jail inmates.

From: *Criminal Justice Newsletter*

Transfers May Violate Eighth Amendment

Timothy Taylor is a small, mentally retarded Michigan state prisoner. While at the Jackson state prison Taylor was transferred to a camp where he was raped. After being raped prison officials labeled him a homosexual and he was denied a job and resident home application. He claims that the screening process used to transfer prisoners violates the eighth amendment because it does not include an adequate review of prisoners' files in order to separate the prey from the predators.

The defendants moved for summary judgement, which the court denied in part. The court notes that failing to segregate violent and non-violent prisoners has been held to constitute deliberate indifference, in violation of the eighth amendment, where it can be shown that a pervasive risk of harm exists or where the victim belongs to an identifiable group of prisoners for whom the risk of assault is a serious problem of substantial dimension. The courts ruled the warden was entitled to neither summary judgement nor qualified immunity. See: *Taylor v. Foltz*, 803 F. Supp 1261 (ED MI 1992).

WA Prisoners Lose Damages in Rectal Probe Suits

In the mid 80's the Washington DOC built two control units called Intensive Management Units (IMU's). One of the policies they implemented was a mandate that all prisoners entering or leaving the IMUs would be subjected to a rectal probe (also known as digital rape) supposedly to search for contraband. Over 2,000 such "probes" were conducted before the practice was finally halted. No contraband was ever found. There has been extensive litigation on this issue with over a hundred prisoners filing suit over being probed; several went to trial and won.

Prison officials had earlier sought and been denied qualified immunity for their actions. See *Tribble v. Gardner*, 860 F.2d 321 (9th Cir. 1988). In considering a consolidated appeal of eight probe cases that went to trial, including *Wetmore v. Gardner*, 735 F. Supp. 974 (ED WA 1990), the ninth circuit ruled that prison officials were entitled to qualified immunity from money damages because they could have "reasonably believed" that a policy of blanket probes of all IMU prisoners, without individualized suspicion, was legal. This ruling will dispose of all claims for money damages arising out of the probes.

The reason the court gives for its ruling in this case is that *Tribble* had produced sufficient evidence to show that the searches were conducted for punitive reasons and that a reasonable person would have known that searches conducted for illegitimate reasons were unconstitutional. Thus, the court denied qualified immunity in *Tribble*. It now grants qualified immunity to prison officials by holding that *Wetmore* failed to provide sufficient evidence that the policy was not legitimately motivated. Specifically, Wetmore failed to show that prison officials did not strip search the prisoners they probed, nor did Wetmore offer expert testimony or affidavits to support this theory.

It then goes on to hold that at the time the probes were being conducted the law was not clearly established that such "searches" by prison officials were unlawful. It cites the fact that such searches were specifically allowed by federal prison regulations and other federal and a Washington state court had upheld such searches. The appeals court holds that the district court erred in denying prison officials qualified immunity and allowing the cases to go to trial. The appeals court reversed all eight cases in the consolidated appeal. See: *Hemphill v. Kincheloe*, _____ F.2d _____ (9th Cir. 1993).

Road Kill for Washington Prisons

Prison food has been the subject of jokes and commentary for ages. Given its general low quality and often unidentifiable nature, meat dishes are often referred to as "road kill" or "mystery meat." If Washington state Representative Steve Fuhrman, (R) Kettle Falls, has his way these comments will be true, literally.

Fuhrman has sponsored a bill in the House Fisheries and Wildlife Committee that would overhaul the system of removing dead deer and elk from roads and make them available to

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state prisons. State law already allows for road kill to be placed on the prison menu and some Washington prisons already do so. The state Department of Transportation is responsible for removing dead animals from the roads. Supposedly the animal must not have been dead more than 4 hours and must be properly inspected and processed by a licensed state processor.

Fuhrman wants the state Department of Wildlife to coordinate pickup and distribution. Whichever agency winds up with the job will have to offer the animal corpses to the DOC.

Given the recent E. Coli outbreak some people question whether serving road killed animals is safe. Gary Plews, of the Dept. of Health's Office of Community Environmental Health Programs said it is safe "as long as it's properly inspected and not too battered." But often it is neither. "Every road kill's a little different... But most of the time it's undergone pretty severe trauma," he said.

Plews said that prisons have been serving road kill "forever, basically." "It's not going to be something you would serve as a steak or a roast." "Most of the time prisoners don't even know its game meat because it's served in stew," Plews said.

Bill Logan of the Washington DOC's Food Service Program says that while some prisons still serve road kill "they're shying away from it a little bit." "There was a big flap at Olympic Clearwater Corrections Center, near Forks about Rudy Stew (as in Rudolph the red nosed reindeer) a few years ago." Logan said the prisoners knew about it and didn't like what some felt were lax standards on serving road kill. "They told me about one deer they brought in there with not a single bone unbroken," Logan recalled. "The truck driver who brought it in must've run over it with all 18 wheels."

Dave Burt, the Clearwater Program Manager says they still serve road kill occasionally, but "there's always something else besides. We operate on a tight budget and I think most prisoners appreciate it."

Fuhrman is holding off on his bill while the matter is being studied.

Source: *Seattle Post Intelligencer*

PLN Editor Wins Retaliation Suit

By Paul Wright

Over the years *PLN* readers have read the periodic reports we have published about the legal struggle against double calling at the Washington State Reformatory (WSR) in Monroe, Washington. Not all of the struggle took place in the courtroom. When the state first announced plans to double-cell us in 1988 there was a lot of debate amongst prisoners over whether or not to seek enforcement of our consent decree, mandating single celling. Like most issues, there were two sides. One side, which I was on, sought enforcement of the single celling provisions of the consent decree. We saw it as necessary to hold the line on that issue to prevent a return to the overcrowding, with attendant ills, of the past. (This is in the context that at the time the DOC wanted to double cell us there was a surplus of state cells and some 2,000 cells were being rented out to the federal government and other states.) The other side, advocated by the administration's lackeys and collaborators, not surprisingly, pushed for total capitulation and not litigating the matter. At the time it was duly noted that most of the advocates of double celling in fact had single cells while the rest of us were double celled.

We successfully won enforcement of the consent decree in the district court in 1989. At that time the DOC was faced with having to single cell WSR. To try to pressure the prisoners into waiving our court victory they started a rumor campaign claiming they would close the prison as being "uneconomical" and transfer everyone to Walla Walla, away from their family and friends, most of whom reside in the Puget Sound area.

Faced with our court victory the DOC tried one last desperate tactic. After trying to panic the prisoner population notorious collaborators then tried to hold a vote on whether or not to pursue the litigation or to sell it out. On March 20, 1989, a meeting of the Lifer's club was held where this was to be debated.

The collaborators spoke first advocating a sell out to double celling. Some others spoke against double celling, as did I. I pointed out that if the state did close the prison that was in and of itself a major victory. The prospect of 400 prison guards in the unemployment line is a good one. I gave my spiel and after a standing ovation we voted. It was unanimous. Everyone voted against a sell out. The rats were shamed into silence and slunk out.

The next day I was slammed into administrative segregation. The "reasons" given at the time by the prison administration were that I was allegedly "developing an international revolutionary network that advocates armed resistance to the US government," the claim that I was supposedly willing to share information on access to US military bases overseas with "anti US groups", and that Ed and I were working on publishing the *Red Dragon* (a more politicized version of *PLN*).

My parents had come to see me from Florida and because I was in segregation I was denied contact visits and a trailer visit with them. I only receive visits from my family once or maybe twice a year. About ten days later I was transferred to Walla Walla as being a "security risk." Prior to leaving the Reformatory, then intelligence officer (now captain) Jim Evans told me that if I would tell them "what Ed Mead is up to" Ed would be transferred out of state, I would remain here and get contact and trailer visits with my parents, etc.

After months of fruitless attempts to administratively resolve the matter I filed suit in US District Court in Seattle over the retaliatory nature of my segregation and transfer. The district court eventually dismissed my suit claiming I had not shown any evidence of retaliation. I appealed the dismissal.

On February 26, 1993, the court of appeals for the Ninth Circuit issued an unpublished memorandum order reversing dismissal of my retaliation claim. The court held that I had shown sufficient evidence of retaliation by noting that two other opponents of double celling, Steve Plant, the president of the Indian Club, and Albert Owen, vice president of the Black Prisoners Caucus, had been put in segregation or transferred within 36 hours of my own lock up. I also presented evidence that within hours of my talk at the lifers club, Lt. Evans was interrogating the president of the lifers and another

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prisoner about my speech and told them he held me responsible for swaying the vote. This circumstantial evidence is enough to require a trial to determine if the administration's pretexts are a cover for retaliation.

The court also said I was entitled to discovery. Before and during the litigation the DOC came up with ten different reasons as to why they put me in segregation and transferred me, retaliation for advocating compliance with the consent decree was not one of them. I sought discovery of all documents that they referred to and used in each of their pretexts as well as the materials that supported my theory of the case. The attorney general's office refused to supply any of the documents. I filed three motions to compel production of the discovery materials and the district court refused to order production of any of the materials.

The appeals court reversal is on rather narrow grounds. Essentially it reversed for trial for factual findings rather than on legal issues. In my appeal I had sought a ruling on what legal standard should be used in the Ninth Circuit in prison retaliation cases, this wasn't ruled on. I don't know if the state will appeal the ruling to the Supreme Court or not.

The 1989 transfer to Walla Walla began my three year tour of the Washington gulag. I managed to see all three Intensive Management Units in the state, both close custody prisons, and had the DOC try to transfer me out of state three times. All this without a history of institutional violence, attempts at physical liberation, drug use, etc., and a relatively "clean" disciplinary record (the infractions I have been found "guilty" of include major felonies like filing a grievance, having communist literature in my cell, getting a letter tape from Ed, etc.). So four years after being repressed for seeking enforcement of a court order it looks like I might get my day in court. We'll see how that turns out. Stay tuned.

Monroe Double Celling Suit Lost

By Ed Mead

In 1981 prisoners at the Washington State Reformatory in Monroe entered into a judicially enforceable consent decree with their captors that would have permanently eliminated double celling at the prison. The original complaint, filed in 1978, challenged a number of prison conditions on constitutional grounds, especially the issue of double bunking. As the litigation slowly wound its way toward trial, the state elected not to test its position in court, and instead entered into a consent decree with prisoners. The decree contained a number of provisions, but central to the agreement was a promise to limit the number of prisoners confined at the Reformatory to the number of single cells at that facility. While it took the state until 1987 to finally comply with the promises it made in the consent decree, and then only when compelled to do so by a federal court order, the Reformatory has been single celled since.

No sooner had the ink dried on the agreement than the state initiated litigation trying to sleaze out from under the decree. Three trips to the Court of Appeals later, the district court has entered an order setting aside the decree. The magistrate's recommendation was that the state be bound by its promise, and the language of the decree was quite clear in this respect. It said that upon completion of the terms of the agreement the court was to enter an order making the terms of the consent decree permanent. But despite the unambiguous language of the decree, and the case law being in favor of prisoners, the district court bowed to the prevailing political mood and dissolved the agreement. It seems as if there is a shortage of prison bed space due to the get tough on crime atmosphere that's gripped state law makers and the ruling class media.

That the solemn word of the Department of Corrections is worthless will come as no surprise to most readers. What has surprised many Reformatory prisoners, however, is that the federal court would set aside a judicially enforceable agreement rather than compel the state to honor it. They do this in the name of not allowing the "court to govern the penitentiary by judicial decree."

Over three months havs passed since the district court's order and the Reformatory has not yet been subjected to double bunking. When it comes, and prisoners expect it will, it is expected to start slowly. After having repeatedly assured the courts that they would not violate the agreement if it was set aside, it would be in bad form for them to so quickly demonstrate their bad faith. Far better to wait a spell, and then to do it slowly while nobody is looking.

The attorney for the prisoners has initiated an appeal to the Court of Appeals, a process that will take from 18 to 24 months. We are not optimistic about the likelihood of success on appeal, though, as the appeals court is also bent on returning to the old "hands off" doctrine that governed the judiciary's approach to prison litigation for so long. We will continue to report any additional developments in connection with this case.

Mentally Ill Entitled to Health Care

H.B. is a woman prisoner in the Arizona DOC. She suffers from schizophrenia and becomes hostile and threatening when she doesn't take her medication. HB's legal guardian filed suit on her behalf claiming that the DOC's pattern of placing HB in lockdown constituted deliberate indifference to her medical needs because psychiatrists did not authorize her lockdown, and while locked-down she deteriorated to a point that constituted a psychiatric emergency. After a bench trial the district court ruled in favor of HB and granted injunctive relief.

With the increasing number of mentally ill being warehoused in this country's prison system, which is not equipped to handle such people, lawsuits of this type will become more common. The district court's findings of fact included: that the DOC neglected treating HB's mental illness, that they punished her for behavior resulting from her illness; the DOC didn't monitor HB's medications; the DOC failed to transfer her to an appropriate facility for treatment; that the DOC's health care system is inadequate to meet her medical needs; that the DOC knew HB was being harmed by their failure to treat her illness and did nothing to correct their behavior; and that HB had been harmed by the DOC's handling of her case.

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The court characterized HB as having "undergone gross mal- and mistreatment and lack of treatment over years at DOC."

The court gives a detailed explanation of the eighth amendment standard for deliberate indifference to prisoners' medical needs. In ruling for the plaintiff it explained the ninth circuit standard for prison medical cases and how that standard is met.

The court held that the supervisory defendants, the DOC director and deputy warden, were liable for the civil rights violations. The court gives a good explanation of how liability attaches to supervisory defendants. In this case it was because they failed to provide proper mental health treatment to HB, because security staff overrode medical decisions concerning treatment made by the DOC's psychiatric staff, referrals to outside mental health care is not prompt, and the defendants knew this and failed to correct it.

In entering injunctive relief mandating HB's treatment and care the court held: "The defendants' treatment of HB over the past ten years has been worse than grossly inadequate or inhumane, it has been barbaric...the defendants have punished plaintiff for her mental illness by throwing her in the 'hole' for periods of time up to a year and leaving her there without any medical care in a highly psychotic state, terrified because of hallucinations, such as monsters, gorillas or the devil in her cell. One psychiatric expert stated he wouldn't treat his dog the way defendants treated HB...Nor does it appear that plaintiff is the exception to the rule as seven to eight women may be locked down at Santa Maria at any one time and may remain there for months without care. Such treatment of any human being is inexcusable." See: *Arnold on Behalf of H.B. v. Lewis*, 803 F. Supp 246 (DC AZ 1992).

Failure to Treat Illness Violates Eighth Amendment

Derrick Williams is an Illinois state prisoner. As a result of a car accident he suffers from chronic infectious inflammation of the bone marrow. After being imprisoned a DOC doctor examined Williams and prescribed medication and a course of treatment. Prison officials did not carry out the doctor's prescribed treatment nor give Williams the appropriate medication. Williams condition deteriorated to the point he was hospitalized. After recovering a bit he was returned to the DOC and placed in segregation and again denied the treatment prescribed by his treating physician. This process continued for a 28 month period. Williams filed suit claiming this lack of effective medical treatment violated his eighth amendment rights.

The defendants moved for summary judgement which the district court granted in part and denied in part.

The court discusses the legal standards of medical eighth amendment claims. The infliction of suffering on prisoners violates the eighth amendment only if it is deliberate or reckless in the criminal law sense. Liability turns on the defendants subjective mental state, not on what the defendant should have known. Using this standard the court found the prison doctors who "treated" Williams were liable for his lack of care. While Williams was seen 42 times by prison doctors in a 28 month period, the court ruled "Mere volume of medical attention is insufficient to defeat an eighth amendment claim. The unrebutted facts set forth by Williams reveal a significant probability of long term, negligent care and, when coupled with the defiance of explicit orders by Williams' primary physician, dictate that we afford Williams the opportunity to present his claims to a jury."

The court also denied summary judgement to the prison captain who refused to provide Williams with a lower bunk pursuant to his doctors orders. A guard who refused to take Williams to the emergency room or health care unit was also denied summary judgement. The court notes that prison security staff, not just medical staff, can be deliberately indifferent to prisoners' medical needs in violation of the eighth amendment.

The court granted summary judgement to the prison wardens by holding they were not personally involved in Williams (mis)treatment. See: *Williams v. O'Leary*, 805 F. Supp. 634 (ND IL 1992).

MANCI: The Aftermath

By John Perotti

In June, 1992, MANCI guard Thomas Davis was stabbed in the back shoulder. Prisoner Roy Slider was accused of the stabbing. Davis died at a Mansfield hospital the next day. This began a series of retaliatory transfers and total lockdown of the prison for one month and semi restricted movement lasting until February, 1993. The guards' union demanded a continuous lockdown but were pacified when the security of the prison was changed from max-close to close and over 300 max prisoners sent to the Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio.

The prisoners transferred immediately after Davis died were placed in Administrative Control (AC) at the SOCF. An internal investigation absolved all of them of any involvement in the death of Davis. SOCF warden, Art Tate, apologized to the men, released them from AC and told them they would return to MANCI within 30 days, as their former security status was reinstated.

As of this date none of the prisoners have been returned to MANCI. One of the prisoners, Jay Hill, is a co-plaintiff in our suit challenging several conditions as well as retaliation. He was transferred to SOCF just one day after a telephone status conference with Judge Bell, Warden Baker and the state attorney where he told all parties the suit would be dismissed if I were returned to general population. Hill is one of the only medium security prisoners being held at SOCF. Everytime he is recommended for transfer, central office overrides the transfer denying it. Of course, prisoncrats would deny that his transfer and continued overriding of transfer recommendations are retaliation for our suit, as well as my 18 month confinement in AC for a set up others would do only 8 months for.

An added twist is that while the media was being told that guard Davis was killed by Roy Slider, it was known all along that this was a lie. Davis was stabbed once in the shoulder and was conscious and coherent during his hospital stay. The next

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morning he died of liver and kidney failure. The media didn't report this until after the grand jury refused to indict Slider due to the autopsy report confirming this fact. They ordered the body exhumed and another autopsy performed. The second autopsy confirmed that the stab wound was not the cause of death, that Davis died of a massive overdose of steroids resulting in kidney failure that the hospital staff had been negligent in evaluating. Slider has now been indicted for attempted murder and Davis' widow has sued the hospital for negligence. MANCI guards are *still* wearing black tape over their badges in memory.

Former MANCI major John Manison was just fired over theft charges for $150 confiscated cash that disappeared from the evidence room. Manison was on probation for assaulting a parolee in the prison parking lot a few years back. Manison was placed on administrative leave last year after prison informant Jerome Evans did his thing for the fourth time, taking a nurse hostage while in the AC unit, making her remove her clothing and licking her body while demanding a transfer. Evans is charged with kidnapping and gross sexual exploitation. Evans had told a prison psychologist he would take a hostage if not released from AC or transferred, the information was forwarded to Manison who didn't act on it.

And these are our keepers. It's no wonder prisoners leave prison full of anger, contempt for the Injustice System and full of bitterness. We are slapped in the face with our dual system of justice daily, one for the rich and one for the poor.

Minn. Prison signs Contract for Puerto Rican Inmates

St. Paul, Minn. - about 500 prisoners from Puerto Rico will come to Minnesota as early as this month under a deal that finally will fill a privately operated prison in Appleton built to create jobs.

Appleton officials said they had signed a multi-year contract to board prisoners from the commonwealth of Puerto Rico at the new Prairie Correctional Facility, the $28.5 million medium-security penitentiary that has been standing empty for four months.

Ninety-three Puerto Rican prisoners were flown to a prison in Florida, where they will be held while supervisors of the Appleton prison make final preparations, which include offering Spanish lessons to prison guards and arranging for a local cable-television company to bring Spanish-language television programming to the prisoners' cells. Officials will also hire 70 more workers for a payroll that already includes 85 people.

Editorial Comments

By Ed Mead

With this issue we start our fourth calendar year of printing *PLN* (we began our fourth *publishing* year back in January). Paul and I have been looking back on what we've been able to accomplish during this period and we feel pretty good about the newsletter's progress. The number of readers has slowly increased, our format has become increasingly more professional, and we believe the quality of information we've been able to provide you with has also improved. There is more we would like to have done, yet, considering the conservative national mood, we are fortunate to have even survived as a publication this long. There are two central reasons for this longevity--our readers and our volunteers.

First, our readers have consistently voted for our continued existence with their pocket books. Without your ongoing financial support we would have been history long ago. As it is, we enjoy a certain measure of economic security. When there has been extra money we've passed it on to you in the form of extra pages.

Secondly, even with your ongoing financial assistance, we would not have been able to be with you this long if it had not been for the dedication of our outside volunteers. The names of these workers are listed in the Staff Box on the last page of every issue. The *PLN* works like this: Paul and I write the various articles, and type and edit those from other contributors. We send the typed articles to Dan in New York, who, with a friend there, keyboards them into his computer and does the desktop publishing. He then prints out a master copy on his laser printer and mails the final product to Sandy in Seattle. Sandy takes the master to the duplication place and has the necessary number of copies printed up. She, along with friends when she can get them, also folds and staples the paper.

While Sandy is getting the printing and folding done, Janie is making the address labels from our database and contacting other volunteers with a reminder of the date for the upcoming mailing. They meet at the University Friends Center in Seattle on that date, which is the last Tuesday of each month (at 3:30 pm, for you folks in Seattle who can make it). Also there are Michael, Jim, Carol, and several other people who only occasionally make it to the mailing. Together they do the final step in putting the paper out, adding the labels, sorting, etc. Then Jim takes the final product to the post office for mailing. There's a bunch of special paper work he has to do because of our non-profit bulk mail permit. So when this whole process is done, the newsletter is then mailed to you.

Paul and I receive a lot of praise from readers for the work we do. We in turn thank both our subscribers and the dedicated volunteers for their continuing support. You are the ones who are making it possible for us to become a first rate publication.

The response to my offer to start a legal, philosophical and political study group by mail has not generated much support. As of this writing (3-19-93) there have been only three inquiries. One of those wrote and said: "I'd like to enroll in your law class. I need some good self-help law books." That was the

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complete text of his letter. Well, this idea was not conceived as a free law book program, but as a means of raising prisoner consciousness. I'll give it another try in about a year. Maybe there will be more interest then.

Now we come to what is for me a touchy subject. I am serving my 18th year for an assault in which neither of my police officer victims were so much as scratched. While I have litigated some aspects of my conviction, I've never launched a promotional campaign in support of my freedom. I have instead elected to use my time in an effort to build a struggle on the inside. That has now changed. Of course I will still be doing the political work I always do, but in addition I am going to make some noise about being so harshly treated. A friend has written a three-part series of articles on my situation that I am going to ask other publications to print. It would be unfair for us not to print them as well, since we clearly have the means. Accordingly, this issue of the paper will have two extra pages containing this series of articles (I will combine them into a single piece). The extra pages are so you will not be missing any of the legal news or political analysis at the expense of the space occupied by this article.

George Jackson taught us that we must resist the class enemy where ever we happen to find ourselves on his soil. Over the years I have tried to live by this injunction. In general I have little respect for political prisoners who spend their entire terms engaged in self-promotion. And it is in part this distaste that has inhibited my use of precious movement resources to secure my own release. However, it is now long past time for me to get out of prison. But in doing so I will not be using *PLN* resources or volunteers, and my use of the newsletter will be quite limited. I am doing it this time in the hopes of informing and possibly securing the help of outside readers who may in some way be willing to contribute to the furtherance of this process.

It should be noted that while Paul and I will run stories supporting the release of selected prisoners, this will only be for those confined for political reasons--those who are still in prison as a result of their efforts to further the struggle for justice. Without such a restrictive policy we would be flooded with requests from social prisoners seeking to overturn their unjust convictions. We simply do not have the space to report on the cases of everyone who has been wrongly imprisoned.

As you can see the *PLN* has a new look. We will be moving to as many as 16 pages per issue and expanding to a magazine type format. Until the dust from this process settles, you may be seeing us looking differently month to month. Be patient with us as we try to find the right combination of cost and format. No matter what form we eventually settle on, you will be getting more pages, and value, for your subscription dollar.

That's it for this month. If you have not contributed lately, now would be a good time to do so. We give over 38% of our subscriptions away to prisoners who do not have money (death row, control units, etc.) and the new format and extra pages have increased our production costs. If you support the work we do, then say so with your money or stamps. We're here for you, be there for us.

Criminal Justice System Unfair to Radical Activist

By Jon George

> "Toiling for the searching ones, on their speechless, seeking trail, An' for each unharmful, gentle soul misplaced inside a jail."
>
> --Bob Dylan, *Chimes of Freedom*

In 1978, Ed Mead said, "I feel a lot of interior conflicts. One side of me feels the need to stay here and build programs; the other side of me feels I'd rather get the fuck out or be dead. I'm in prison now because I tried to help prisoners." It's now 15 years later, and Ed Mead has decided he wants out.

Ed Mead is a prisoner in the Washington State Reformatory at Monroe, and he has just spent more than 17 years of his life serving time for his political beliefs and the actions they led to. Ed took up arms against the state, and the state will neither forgive nor forget, suspending the justice it claims to serve in favor of its ongoing persecution of radical activists.

Ed's first experience of prison life came at age 18, when he was sentenced to three years for burglarizing a cigarette machine. He spent the decade of the '60s passing in and out of similar institutions, paying his dues for similar crimes. That is, until the late '60s, when he taught himself law and underwent a political awakening soon to be experienced by a generation of Americans on both sides of the bars.

His legal efforts were rewarded with the sincerest form of flattery as actual attorneys began to copy his briefs. And his work on behalf of other prisoners put him in touch with the only other people who seemed to care about those locked up--political activists. As he says, "I got to thinking about it until one day I didn't identify as a criminal anymore. I identified as a radical." This conversion pushed him into further action. Objecting to inhumane conditions and guard brutality, he participated in a series of prison strikes, prison and prisoner-support committees, a protest at the American Correctional Association convention, and fund-raising for the Attica massacre survivors.

In 1975, he joined the George Jackson Brigade, designed to support prisoners from outside the walls by directly confronting the criminal justice system. The group's name was taken from a radicalized black convict in Soledad, framed for attempting to escape, and murdered by guards in 1971. The Brigade's first act was the bombing of the Olympia, WA headquarters of the Department of Corrections. From '75 - '78 the group carried out close to 20 politically motivated bombings against oppressive or exploitative targets. Care was taken to target only property, not people.

On January 23, 1976, Ed's active role in the group came to an end during an attempted robbery of the Pacific National Bank in Seattle. The expropriation of funds for the revolutionary movement ground to a halt as police attacked the building before giving the Brigadists a chance to surrender. One of Ed's comrades was killed by a police bullet in the back, another was hit in the face. Ed was captured after returning fire.

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During his subsequent 17 years in prison, Ed continued his struggle for better prison conditions. He has led work strikes and hunger strikes, produced prison newsletters, filed civil rights suits on behalf of psychiatric prisoners, and worked tirelessly to educate, organize and progressively change the prisoners themselves. These efforts include attempting to desegregate the mess hall of the infamous Marion penitentiary, starting Men Against Sexism to stop prisoner-on-prisoner rape, as well as homophobia and gay-bashing, disseminating legal information to prisoners, and serving as legal advisor to Native Americans seeking freedom of worship during their incarceration. Somewhere in the midst of all this he also found time to earn a college degree in computer systems.

After years of putting his own life on the back burner, Ed feels it is finally right for him to concentrate on securing his own release. He has asked me for help. Since I agree with him, I in turn am asking you. I have little doubt but that I'm facing a tough audience. Most of you reading this probably have mixed feelings--hopefully a little admiration for his work in prison, probably condemnation for the actions that put him in there.

I'm not going to claim that Ed is innocent, a path chosen by many political prisoners who believe in the world view I just alluded to and thus see lying as simply one more means of struggle in a war where all methods are condoned. I will tell you, however, that Ed has never admitted to participating in a Brigade action besides the robbery attempt, nor has there been any evidence that he was, or any charges brought against him for such actions.

My argument for his release will not be that he is a model prisoner who has completely reformed, although an excellent case exists should I have chosen that approach. His last infraction was over seven years ago, he has no history of violent crime, he has educated himself, improved himself, and no longer advocates those tactics.

In fact, Ed is not even asking for immediate release--he simply wants his sentence reduced to the time remaining on his attempted bank robbery charge. And in the interests of justice, the request should be granted.

Contrary to the spirit of the law's guidelines, as well as to cherished legal and moral principles, Ed Mead is facing two life terms in prison for first-degree assault. In Washington state, first-degree assault is a crime that usually results in an offender serving under five years in prison, and that's if someone is actually hurt. But Ed, because he had the temerity to resist the police, has one of the longest sentence in state history under such a charge.

These two life sentences cannot be tied to the severity of his crime (for no one was injured) and we are, therefore, led to the conclusion that his outrageous sentence was politically motivated, a means of revenge against a man opposed to precisely the sort of prison abuse he now faces.

What makes his disproportionate sentence unjust? First, it is a hallmark of democracy (as well as any political system that claims to be fair) that we have equality before the law. Rich and poor alike are supposedly subject to criminal penalties; even those in power are not above the law. Secondly, equality under the law means that the lives and rights of the average citizen are not to be valued any less than those of the wealthy. We've moved beyond the wer-geld of the Teutonic tribes in which the severity of the penalty corresponded with the social position of the victim, not the seriousness of the actual criminal act.

Equality before the law is itself derived from a larger concept sacred to democracy and free societies; the equality of the people themselves. And this, when combined with the logical truism that equals should be treated equally, leads us to the unsavory but inescapable conclusion that the Washington parole board just isn't playing fair.

If the average amount of time served for a injurious assault is under five years, then the only rational explanation that exists for Ed's sentence (predicated upon actions that had no harmful result) is that the lives of police officers are being valued more than the lives of you and me. By tying Ed's sentence to who his victims were and not what he did to them, the state has violated its very reason d'aitre, namely to preserve our rights across the board.

It should come as a slap in the fact to every resident of Washington (and indeed the nation) that those charged with protecting us place a higher premium on their own skins, and use their power to see that this disparity becomes a legal maxim.

However, this is not the only way in which the principle of equality is being shattered. Ed is also being singled out for his political beliefs. Since Ed's initial sentence cannot be reduced under the law's structure, his goal of having time limited to what is left on his bank robbery charge depends on his being paroled from the two life sentences. And being considered for parole depends to a large extent upon the perception of "rehabilitation" held by the parole board. And the perception they have of Ed has been clouded by political prejudice.

Evidence of Ed's "rehabilitation" is voluminous. He has educated himself, devoted his time to bettering the prison population and the prison experience. He has also changed his attitude towards type of political violence he was engaged in, now deeming it ill-fitted to the time. While some are no doubt skeptical about such self-proclaimed conversions, it should be mentioned that this shift in thinking has been noted by, and his request for parole to his federal detainer endorsed by, no less important collection of people than his counselor, unit team, the prison's review committee and prison warden. And these are the people who have actual contact with him.

The parole board, however, continues to rely on a psychological review done in 1976, shortly after his arrest. This review (which Ed refused to participate in) came to the conclusion that Ed was a violent revolutionary. And it is this characterization of Ed's political beliefs which the Board had tenaciously clung to, never bothering to examine Ed's actual conduct, only his ideas that they feel should be locked up for life.

But by this act, the Parole Board violates the First amendment which guarantees freedom of speech and thought. Singling Ed out for parole denial because of his earlier beliefs is the same as penalizing him for them. Thus, the state says it is words, not actions, which mark one a criminal for life. And yet

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another egregious error is done to this man whose only goal was to make life a little better for those with no voice of their own.

Ed deserves to be treated like any other person. He has done the crime, and done enough time, and he should come home.

We now turn to the last remaining objection to Ed Mead's release. It is not an objection put forth by the state, but one prominent in the minds of those people who have the collective power to sway the outcome of this appeal: you and me. Accepting the fact of disproportionate sentencing, some might say that the answer is not paroling Ed, but making sure everyone facing similar charges receives equally harsh sentences.

After all, even though former president Bush pardoned those who financed and equipped Nicaraguan terrorist groups, it does not follow that we should or now have to pardon all others locked away for actions of armed struggle. On the contrary, it could be argued, we need to put a stop to these pardons and paroles so there's stiff sentences across the board.

Fine, I'm in full agreement with the premise on which this sentiment is founded: namely, disparities in justice should be an impetus for increased vigilance, not an excuse to let everyone go unpunished. But what is justice? And are prison sentences, however long, capable of restoring the breach in the moral fabric which is crime?

Essentially, there are three competing and interconnected theories of punishment. Does Ed's sentence, or even the concept of prison itself fall under any of these?

The first theory says that justice should be compensatory; its goal is for the offender to compensate the victim to the tune of the crime. In Ed's case, no money was ever taken and no one (other than his comrades) was actually hurt. Under this scheme, it is hard to see why Ed would be sent to prison at all, and certainly no reason why he should be there now.

A second version of criminal justice is rehabilitation. Somewhat ironically, the offender is locked away not for what they have done, but for what they might possibly do in the future. Prison functions under this scheme both as a warehouse for people who remain a threat to society, and as a place for the incarcerated to "better" themselves for their eventual return to the loving arms of the community. As discussed last time, Ed would deserve his freedom under this scheme as well. Whatever threat he posed to wealthy peoples' property has dissipated, and his time was spent staying abreast of today's technology. In addition to this, it should be noted that leftist political prisoners in America have the lowest recidivism rate of any other class of convicts. And given the rates for other prisoners, one has to question if prison ever aids in rehabilitation or only puts up barriers of isolation, alienation and brutality.

By now, some of you are probably rolling your eyes. To you, rehabilitation is a bleeding-heart pipedream. For you, justice means "and eye for an eye, and a tooth for a tooth." This may come as a surprise, but I agree wholeheartedly. So let us assume a retributive model. What is Ed actually serving time for? Since he didn't actually succeed in doing anything, more than 17 years in prison seems a little outlandish. Once again, Ed seems to have been punished for nothing.

But if we move beyond strict retributive theory, we come across a variant that says one can be punished for what one attempts to do, with the punishment corresponding to the intended crime. In the case of the bank robbery, no one disputes what was attempted. But by now the government has stolen far more of Ed's life than the amount of money he intended to steal, and it has had to spend over a half-million dollars to do it (a minimum of $30,000 per year for 17 years).

Leaving aside the sentence for bank robbery, which Ed isn't contesting, we come to the slightly sticker problem of the assault charge. Ed claims he was shooting to secure a negotiated surrender. While some may doubt this, it is clear that the state interpreted the action as a simple assault rather than an attempted murder--lending credence to Ed's claim. If this is still not enough for the bloodthirsty, I have to ask you, in all seriousness, how nearly two decades of abuse and isolation can ever be equated with the few seconds of terror experienced by the police; how the window of injury that those police looked out of for a brief moment can justly be opened for the rest of Ed's life in the violence-ridden prison system. This isn't retribution, it's exponential torture.

As for the rest of you: since we can never be sure what was in Ed's mind as he was firing, it is impossible for us to accurately judge the intent of his actions in order to assess it for retributive purposes under intent theory. We are therefore compelled to consider only the results. And the results were: whatever was attempted, was stopped. We are thrown back upon the conclusion that Ed should be released.

Thus, through all the permutations of justice, we reach the same inescapable conclusion. But this conclusion does not become manifest at the point of one's awakening to its force. This conclusion, fought on the field of thought, must now be extended to the plane of reality. Because Ed's freedom will not be won by judicious reasoning, only by public pressure. And it takes more than one person to apply the sort of pressure needed.

So please, if you agree with me about Ed Mead's predicament, for any of the reasons I've stated, lend a hand by writing or calling the governor, asking for his release to the federal detainer. Help Ed to get this part of his life behind him and start to do some good on the outside; where we need him so badly--and where he deserves to be.

Governor Mike Lowery
State Capital
Olympia, WA 98504
(206) 753-5000

Bombed-out German Prison to be Razed and then Rebuilt

Darmstadt, Germany - Bombs set off by guerrillas on March 26th at a new prison in Darmstadt caused such extensive damage that it will have to be razed, a justice official said. There were no injuries.

The federal prosecutor's office in Karlsruhe said a letter found in a getaway car claimed a Red Army Faction commando had carried out the bombings.

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The leftist Red Army Faction guerrilla group has carried out numerous bombings, assassinations and other attacks against NATO, government and industrial targets in Germany over the past two decades.

The $153 million prison, 18 miles south of Frankfurt, had been scheduled to open the following Thursday. But the Hesse state justice minister, Christine Hohmann-Dennhardt, told reporters it would have to be torn down and rebuilt.

Police said the bombings caused $60 million in damage.

Five masked and armed people entered the prison complex, tied up the 11 workers and drove them to nearby woods. The attackers then detonated several bombs, destroying the administrative building and four cell blocks, said Hans-Juergen Foerster, federal prosecutor's spokesman.

Foerster said the attackers fled in a car owned by one of the prison employees and abandoned it at the town of Waldorf, nine miles north of Darmstadt.

Brazilian Cops Charged in Prison Massacre

In Brazil 121 police officers have been formally charged with the murder of at least 111 prisoners at Carandiru prison in Sao Paulo on October 2, 1992, when they invaded the prisons cell block 9 on the pretext of quelling a riot. [*PLN*, Vol. 4, No. 1.]

Former commander of the Metropolitan Police Ubiritan Guimaraes was charged with principal responsibility in the massacre; he could receive up to 30 years in prison if found guilty. Among those charged are 87 high ranking officers. [*Editors Note: Compare this to Attica where no government officials were ever charged or convicted of their crimes that left 42 dead and hundreds of prisoners beaten, tortured and mistreated afterwards.*]

Source: *Weekly News Update*

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The Evolution of Criminal Justice

by Sandy Judd

In twentieth century America, coerced confessions to criminal acts are not technically admissible as evidence in courts of law. Since the 1980's, however, a movement against the enforcement of such "technicalities" has developed within the federal courts. As more forms of questionable evidence become admissible, we must begin to ask ourselves if justice is being properly served. Although blatant physical torture is not yet regularly used, other techniques for obtaining confessions are common: promises of leniencey, threats, isolation, sleep and food deprivation, forced nudity and other practices which serve to demoralize the accused. The validity of these confessions is highly questionable.

Most people today would agree that confessions to acts of witchcraft are mostly false, as the confessed acts are impossible. Nonetheless, in seventeenth century Europe many witch hunters obtained very high rates of confession to such acts. Some, such as Matthew Hopkins in England, did so without using obvious forms of torture which would have left physical marks or deformities. This is because it is not the pain that makes the person confess, but the loss of hope that accompanies it. All methods of coercing witchcraft confessions during this period had the underlying, though often unconscious, goal of demoralizing the accused witch; once this was accomplished, the confesion always followed.

This is why these techniques are used today, not just to obtain confessions, but to break the spirit of anyone within the grips of the criminal justice system who proves to be a nuisance, and to break prisoners' ties to the community and thus limit public knowledge of what they are subjected to. While it is important to examine modern day uses of these methods in obtaining confessions, we can't ignore their use on already convicted prisoners, especially since convictions without confessions are more easily obtained now than in seventeenth century Europe.

Matthew Hopkins, English "Witch-Finder General" in 1645-6 used a method of obtaining confessions which proved quite effective: to induce a state of delirium in the accused to where she didn't know what she was confessing and often didn't remember it later. Elizabeth Clarke was ready to confess after three days and nights of "watching," which combined intimidation with sleep deprivation. A critic of Hopkins, John Gaule, described the procedure in 1646: "Having taken the suspected Witch, she is placed in the middle of a room upon a stool, or table, crosse-legg'd, or in some other uneasie posture, to which if she submits not, she is then bound with cords; there she is watcht and kept without meat or sleep for the space of 24 hours."

A famous modern case in which Hopkins style techniques were used, and one which involved a false confession to murder, is that a Randall Adams. The State of Texas sentenced Adams to death following a trial where the only evidence was the purchased testimony of witnesses and Adams' confession. Adams was unaware that he had signed a confession, as he had been deprived of sleep and food until he became delirious and no longer conscious of his actions. The effectiveness of this tactic is shown by Adams' previous refusal to sign a confession when investigators threatened him with a gun. All of this was exposed with the release of the film *The Thin Blue Line*. Had this film not been made, Adams would still be in prison.

This type of coercion, though, is most commonly applied today to prisoners who become politically active or are critical of authority. Adrian Lomax, who himself was recently put in a sensory deprivation control unit for writing an article which "encouraged disrespect" for a guard at the prison he was in, reported in a different article that a fellow prisoner at Waupun got three months in segregation for saying "burn it" as an American flag was being raised. Similarly, Amnesty International pointed out in its criticism of the isolation unit that it is used "to isolate and brutalize women for their political beliefs."

Matthew Hopkins wrote a pamphlet in 1647, in which he defended his practice by describing his method. He denied tying up his prisoners, walking and watching them, just as Lexington officials would certainly deny being brutal to their prisoners, but he did admit to isolating them and explained why: "When a witch is first found with teats, then she is sequestered from her house, which is only to keep her old associates from her, and so by good counsel brought into a sad condition... is brought to remorse and sorrow for complying with Satan so long... and then without any of the before-mentioned hard usages or questions put to her, doth of her own accord declare what was the occasion of the Devils appearing to her." Here, as in Lexington, the goal is to demoralize the prisoner and then brainwash her into submission.

Another effective seventeenth century method of demoralizing accused witches was the practice of stripping them

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early in the investigation. In England this was usually done under the guise of a search for the devil's mark, or witch's teat, from which she nursed demons in the form of imps with her own blood. The *Malleus Maleficarum*, an early German witch hunting manual, encouraged stripping the accused prior to the first attempt at talking her into confessing. The justification was a witch-tailored version of the excuse usually given for stripping a prisoner: "And the reason for this is that they should search for any instrument of witchcraft sewn into her clothes; for they often make such instruments, at the instruction of devils, out of the limbs of unbaptized children, the purpose being that those children should be deprived of the beatific vision."

This tactic is most frequently used in modern times to discourage prisoner contacts with their families and other outsiders. One case involved a prisoner's sister who was stripped to her underwear *after* a visit, because she was suspected of passing marijuana to her brother during her visits. Although a guard was posted to watch the two during their visit and the searching guard felt under the visitor's bra, no marijuana was found. A 1991 case from Rhode Island concerned a prisoner's visiting daughter who was strip searched in retaliation for the prisoner's sarcastic remark that a high ranking prison official had supplied him with cocaine. In 1988 a prisoner's wife was subjected to a body cavity search without probable cause as a condition to visiting her husband. These women all won their cases in court, but the frequency of these cases indicates that strip searching of visitors is common, as most visitors are not likely to file suit.

Similarly, prisoners themselves are routinely subjected to strip searches as a condition to have visits. At the Washington State Reformatory, for example, prisoners are constantly observed during visits and are not allowed to leave the visiting room without terminating the visit. Nonetheless, they are strip searched following each visit and subjected to a visual anal search.

Another method of coercion that was common in witch cases was the use of the threat of torture. The *Malleus* suggests that if the judge can't convince the witch to confess (after stripping her), that he show her the implements of torture and try again to covince her. The principle can also be extended to the threat of *further* torture when torture has already been applied. Historian William Monter suggests that a major reason for the relative mildness of the Swiss witch trials is that the Swiss followed the restrictions in the Imperial law code, which placed a three day limit on torture. Many people were able to withstand severe torture without confessing because they knew that it would eventually end. This strongly supports the idea that it is not the pain which brings out the confession, but the sense of hopelessness. It can also help us to understand why modern prison officials are so eager to get past state limits on the length of time a prisoner can be placed in isolation. They do this by labeling it "administrative," as opposed to "disciplinary," segregation, making it conceivable for a prisoner to spend months, years or even his entire sentence in control units such as the IMU at Walla Walla.

The other side to this is the practice encouraged in the *Malleus* of granting false promises of leniency if the person were to confess, which, combined with threats of torture, proved to be a very successful measure. The effect is the same in modern times. A U.S. government report noted that in 1986, defendants pleaded guilty in 89% of cases resulting in conviction. This is because they are about 40% more likely to receive a prison sentence if convicted by a jury and three times as likely to receive life in prison or death. This is made very clear to them during the plea bargaining process. As in the seventeenth century, however, it is possible that promises of leniency in exchange for guilty pleas are false, as judges can, and often do, increase the sentence agreed upon by the prosecutor. At this point, the accused has already pled guilty and has lost his right to a jury trial.

Friedrich Spee, a former confessor to convicted witches, anonymously published a criticism of German witch trials in 1631, in which he showed that it was impossible for an innocent person not to be convicted. He took his audience through the judicial procedure with the hypothetical case of a woman named Gaia. At one point he says, "If Gaia does not die and some exceptionally scrupulous judge hestitates to torture her further without fresh proofs or to burn her without a confession, she is kept in prison and more harshly fettered, and there lies for perhaps an entire year to rot until she is subdued." This implies that in some cases women who withstood torture without confessing would confess after being kept in prison for long periods of time. Similarly, prisoners who insist on their right to a jury trial often change their minds after being held in jail for month after month. This is because the point at which the confession is made is

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not necessarily the point of greatest pain, but that of greatest despair.

To add particulat relevance to all this, let's look at one more modern case. Alexander Cockburn recently outlined this case in *The Nation*, which involved Clinton's new Attorney General, Janet Reno. When faced with a tough bid for re-election as a Florida prosecutor in 1984, Reno decided that she needed to have more convictions in her name, resulting in what is known as the Country Walk case. A couple who ran a day care center in a wealthy neighborhood were investigated for molesting children, but as in the case of Randall Adams, there was no reliable evidence against them, and a great deal of evidence in their favor. Rather than doing the rational thing and concluding that maybe they were innocent, though, Reno simply changed strategies, trying to divide the couple and get the woman to testify against her husband.

At this point nearly all of the previously mentioned techniques were used on this woman. She was imprisioned, placed in segregation, stripped and kept naked under the guise of a suicide watch, and threatened with further such treatment if she didn't confess and testify against her husband. After eight weeks of this, she was still insisting on her husband's innocence, so, as with Adams, they subjected her to countless hours of "good counsell" until she finally cracked. In her delirium, she stated, among other things, that her husband had hung her and their son up by their ankles, rubbed their legs with feces and placed snakes on their genitals. As many a witch had confided in Friedrich Spee that they had given false testimony in order to end the torture, this woman told the judge in her case that she was innocent but pleaded guilty "for her own good." She got a ten year sentence plus deportation, and her husband, who still maintains his innocence, got six life sentences plus 165 years. (Florida isn't running a prison system; it's running a mortuary.)

Critics of the seventeenth century witch trials were right when they claimed that a confession which is produced through torture cannot be trusted, whether that torture is blatant or subtle. This is something to keep in mind as we modern Americans get tougher on crime by eliminating the protections traditionally guaranteed to the accused and convicted.

How to Defend Against a Bill of Costs

By John Adams

I'm a prisoner at the Washington State Penitentiary. I've filed a few lawsuits over the years against prison officials, prison employees and prison conditions with some success.

Recently, I had a case dismissed on the state's motion for summary judgement. After the court granted the state's motion, Assistant Attorney General Carol Murphy filed a **Bill of Costs** against me for $284.10. In other words: I was being sued for my litigation. Federal Rules of Civil Procedure 54(d) covers cost of litigation for the prevailing party.

Recently, after my deposition was taken by AAG Douglas Carr in another lawsuit, Mr. Carr told me that "the Attorney General's Office is going to pursue costs in inmate lawsuits relentlessly." I believe that the Attorney Generals Office is on a campaign to deter prisoners from petitioning the courts by intimidating them into submission with a Bill of Costs. I've successfully defended against the bill of costs filed against me in my lawsuit, and here's how you can.

A bill of costs can be entered against you even though you were allowed to proceed *In Forma Pauperis*. See: *Sales v. Marshall*, 873 F.2d 115 (6th Cir. 1989). However, when a party claims indigency, "courts have required a determination of his or her capacity to pay the costs assessed." *Sales*, Id. at 120. Courts have looked at both the prisoner's trust account balance and his income in establishing the amount of payment. *Smith v. Martinez*, 706 F.2d 572 (5th Cir. 1983).

The burden is upon the plaintiff (you) to make the court aware that he is incapable of paying such costs. See: *Gradner v. Southern Ry. SYS*, 675 F.2d 949 (7th Cir. 1982). You can do this by attaching a statement of your trust fund account to your "Motion for Review of the Clerks Entry for Bill of Costs"; by telling the judge whether you have a prison job and how much a month your job pays; by pointing out to the court the little income you get is essential for "personal hygiene items" from the inmate store. *Gluth v. Kangas*, 951 F.2d 1504 (9th Cir. 1991), (Court found that $46 per month was reasonable figure for prisoners to purchase needed personal hygiene items from inmate store).

Additionally, the court may look to the purpose of the rule, the litigation history of the party, good faith, and actual dollars involved. See: *Weaver v. Toombs*, 948 F.2d 1004, 10013 (6th Cir. 1991). If you have a history of filing "frivolous" law suits most likely the judge will order you to pay costs. The courts reason that costs serve as a deterrent to "frivolous litigators" because they will have to decide whether or not their complaint is more important than their having to pay for costs incurred as a result of their litigation filed in bad faith.

Don't let representatives of the Attorney General's Office intimidate you. If you have a legitimate complaint that prison officials are unwilling to work with you to resolve, exercise your constitutional right of access to the courts. See: *Bounds v. Smith*, 430 US 817, 821; 97 S.Ct. 1491 (1977).

[***Editors Note:*** *A recent tactic being used by the Washington AG's office is to try to increase the cost of litigation for pro se prisoner litigants in an effort to bankrupt us out of court. AAG Carr represented the DOC in a suit I filed. Among the tactics he tried in order to jack up my costs were: refusing to provide me with a copy of my deposition unless I paid $1.00 a page for it; charging me copying costs on discovery; making me pay for the phone bill on telephonic depositions and refusing to make non party witnesses available for deposition unless I paid subpoena witness fees. I was able to fend off all these efforts except for the subpoena fee issue. These are just sleazy tactics by the AG's office to try to gain tactical advantage and intimidate prisoners. PLN has reported cases in the past where efforts to recover IFP fees and costs have proven unsuccessful.*]

WA Ad Seg Rules Create Liberty Interest

Tillman Farr was a prisoner at the Washington State Penitentiary (WSP) at Walla Walla. Prison officials placed Farr in Administrative Segregation (ad seg) based on information from confidential informants which claimed Farr and others were going to assault a guard. Based on this information Farr spent several months in the Intensive Management Unit (IMU). Farr filed suit under § 1983 claiming his ad seg placement was in violation of his due process rights and done in retaliation for his having filed grievances and complaints against prison officials. The district court, magistrate Hovis, granted summary judgement to the defendants. While Farr lost his case the language of the ruling is very good, and will definitely be of assistance to Washington state prisoners.

The court began by noting that while prisoners have no constitutional right to use of a grievance system, they do have a constitutional right to petition the government for the redress of grievances. It is well established that prison officials may not retaliate against prisoners for exercising their constitutional rights. Thus, any act in retaliation for a prisoner's exercise of his protected rights would violate the constitution.

The court provided an extensive discussion of the relevant law governing the use of confidential informant testimony. It also distinguishes between the use of informant testimony at disciplinary hearings, as opposed to administrative segregation hearings. While due process does not require that the identity of confidential informants be revealed, at ad seg hearings, it does require that a determination be made as to its reliability. The reliability of the informant testimony can be established by: 1) the investigator's oath as to the truth of the report containing confidential information and appearing before the disciplinary committee; 2) corroborating testimony; 3) a statement by the hearing committee that they have firsthand knowledge of the information sources and have found them reliable in the past; or 4) *in camera* review of material documenting the investigators assessment of the informant's credibility.

Submission of the confidential report for *in camera* review by the court allows the reviewing court to determine whether the hearing officer's actions were fair, i.e. whether the officer acted in an arbitrary and capricious manner by accepting confidential information without some indication as to the informant's reliability. Prison officials are not required to state the factual basis for their findings regarding confidential informants on the public record.

The court noted that the Supreme Court has held that there is no constitutional right for prisoners to remain out of segregation. However, such a right may be created by the states who promulgate regulations which substantially limit official discretion. This is the first published case dealing with Washington administrative segregation rules in this respect. The court ruled that the Washington Administrative Code (WAC) 137-32-005, in conjunction with WAC 137-32-001, creates a due process liberty interest for prisoners to remain out of segregation. The court gave an extensive and detailed discussion of the reasoning behind its decision, which will assist anyone trying to understand how states create due process liberty interests which can be enforced in federal court.

The state argued that no such liberty interest exists due to a recent decision in *Smith v. Blodgett*, 798 F. Supp 637 (ED WA 1992), which relied on an unpublished ninth circuit decision holding Washington ad seg rules did not create such a liberty interest. The court distinguishes this case from *Smith* by holding only Scott Smith is collaterally estopped from asserting a liberty interest in remaining out of ad seg. Because the ninth circuit ruling in question was unpublished it has no precedential value and cannot be cited or used by the state.

The court ruled against Farr on the merits of his claim. Namely, that after reviewing the informant statements *in camera* there was sufficient evidence for prison officials to find that Farr was a threat to prison security and needed to be held in IMU to protect the guard from the alleged assault plot. That Farr was never infracted or charged in a disciplinary hearing was held immaterial to this analysis. Farr is currently appealing the case to the ninth circuit. The state has filed a cross appeal seeking to overrule the lower court's decision holding that prisoners have a due process liberty interest in staying out of ad seg. See: *Farr v. Blodgett*, 810 F. Supp 1485 (ED WA 1993).

No Liberty Interest in BOP Ad Seg Rules

Howard Awalt is a federal prisoner. He was placed in administrative segregation (ad seg) pursuant to 28 C.F.R. § 541.22 (a)(8) after prison officials received an anonymous note stating his life was in danger. He filed a *Bivens* action against prison officials claiming that his ad seg placement and denial of hearings under 28 C.F.R. § 541.22 (c) and 541.23(b) violated his right to due process of law.

The district court dismissed Awalt's complaint on several grounds. It held that the complaint did not state any constitutional violations nor did it allege that any established rights had been violated by prison officials.

The court held that none of the BOP rules cited created a right to be returned to general population. "The language of 28 C.F.R., Sections 541.22 and 541.23 merely directs a procedure that staff are to follow within certain time frames when a prisoner does not wish to be confined in administrative detention. They do not create a liberty interest in release from detention which a hearing would protect."

The court also ruled that federal prisoners have no right or constitutionally protected interest in UNICOR job assignments or to earn good time credits in that assignment. See: *Awalt v. Whalen*, 809 F. Supp 414 (ED VA 1992).

Initiative 595: Regulated Tolerance

The citizens of Washington state will have a chance to make real progress in the area of drug law reform if the Washington Citizen's for Drug Policy Reform (WCDPR) is successful in getting Initiative 595 on the state General Election ballot this fall. It will be necessary to gather more than 181,000 signatures by July 2, 1993, to guarantee a spot on the November 3rd ballot.

Initiative 595 would allow adults to use marijuana in the privacy of their homes while providing strict controls to keep it out of the hands of those under the age of 21. Unlike legalization or decriminalization, this concept of "regulated tolerance" would prohibit any advertising, public use, or promotion of marijuana which is so common with "legal" drugs such as alcohol and tobacco. It is not the intent of WCDPR to encourage or condone the use of any substance.

The concept of regulated tolerance proposes a workable solution to the problem without the staggering costs of prohibition (it is estimated that this approach would generate approximately $250,000,000 for Washington state). It will also free up limited police resources to be better applied to the problem of serious violent crime. No longer will those suffering from AIDS, glaucoma, cancer and the many diseases which respond therapeutically to marijuana have to endure suffering or risk imprisonment in order to obtain the medicine they so desperately need.

The goal of regulated tolerance of marijuana is to remove the criminal penalties for its use while destroying the black market which flourishes as a natural result of prohibition. Unlike cocaine, heroin, and other drugs, marijuana can be produced safely and cheaply at home by anyone who chooses to do so, ending the necessity to make contact with the operators of the black market who often provide the nexus to other, more dangerous substances. As most marijuana users will attest, they have no interest in using dangerous substances like heroin or cocaine.

The safety of marijuana has long been established by exhaustive tests by government agencies as well as private concerns. Marijuana is so safe, in fact, that the DEA's own chief Administrative Law Judge proclaimed it to be "one of the safest therapeutically active substances known to man," and "far safer than many of the foods we commonly consume." This statement was made after months of hearings, during which testimony and evidence was presented both in favor and against the safety of marijuana. During this period, the DEA could not even convince *their own* Administrative Law Judge that marijuana was dangerous. In the respect that there has never been a reported death attributed to marijuana toxicity, it is far safer than even aspirin.

We as a nation, have experimented with "zero tolerance" over the past decade with less than desirable results. By the DEA's own estimation the drug war has succeeded in stopping only a tiny fraction of the drugs coming into this country with no prospect of better results in the future. We have spent hundreds of billions of dollars on this "war" against our fellow citizens only to see the blackmarket flourish, a diminution of our constitutional rights, our jails packed to overflowing and a burden on our budget that threatens to send us into bankruptcy. On the other end of the spectrum, attempts at outright legalization have met with stiff opposition from those who fear that approach would not offer sufficient safeguards.

Passage of initiative 595 will provide our government a golden opportunity to "cease fire" in the drug war with respect to marijuana and declare an honorable truce with the hundreds of thousands of fellow citizens who desire nothing more than to be left alone to enjoy what limited time we all have on this earth. For more information contact: WCDPR, P.O. Box 1614, Renton, WA. 98057, (206) 226-4164.

[*Editors Note: Of special interest to Washington prisoners is the fact that Initiative 595 contains provisions to give amnesty to prisoners currently imprisoned for marijuana related crimes such as growing, possession, etc. Efforts to undercut this country's draconian drug laws need to be supported because they are one of the leading causes of prison overcrowding and have led to the criminalization of huge segments of our communities. Mobilizing people in support of projects like this initiative also make them mobilizable for other, similar projects in the future and serves an important public interest of educating the public and giving the people a voice in a criminal justice policy debate where currently only the most backward and reactionary sectors of society are being heard.*]

Prison Litigation Report Issued

The winter, 1993, issue of the ACLU's National Prison Project contains a status report of nationwide prison litigation for 1992. Forty states plus the District of Columbia, Puerto Rico and the Virgin Islands are under court order or consent decree to limit population and/or improve conditions in either the entire state system or its major facilities. Thirty two jurisdictions are under court order for overcrowding or conditions in at least one of their major facilities, while 11 jurisdictions are under court order covering their entire prison system. Only four states have never been involved in major litigation challenging overcrowding or conditions in their prisons. The four states are Minnesota, New Jersey, North Dakota and Vermont.

The 11 states where the entire prison system is under court order or consent decree are: Alaska, Delaware, Florida, Mississippi, New Mexico, Rhode Island, South Carolina, Tennessee, Texas, Puerto Rico and the Virgin Islands. Of these, eight states have been cited for contempt for disobeying court orders. Six states which had been under court order or consent decree but are no longer under active court supervision are: Alabama, Arkansas, Georgia, Oklahoma, Oregon and Wyoming.

The article gives a state by state breakdown of pending and past litigation challenging conditions and overcrowding. Not surprisingly, some of the biggest states, like New

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York and California, also have the most lawsuits against individual prisons challenging conditions of confinement even though the suits are not systemwide.

The *NPP Journal* is an excellent quarterly publication and is highly recommended. In addition to this article the Winter, 1993, issue has an article by Luke Janusz on the difficulties of prison publishing, changes brought about by outside AIDS activists in prisons, District of Columbia public defenders doing prison litigation, a listing of suits the NPP is involved in, a resource listing of NPP publications and a case law highlight of prison cases. Their caselaw section also includes analysis of case doctrine and where legal standards are evolving. Subscriptions are $2.00 a year to prisoners, $30.00 a year to free people. Write: National Prison Project, 1875 Connecticut Ave. N.W., # 410, Washington D.C. 20009.

COMPUTERS AND REHABILITATION

Taking Responsibility For The Future

By Ed Mead

For many years I have railed against the approach taken by the Department of Corrections (DOC) in connection with its role vis-a-vis the public's interest in being free from current levels of criminal victimization. It has been my position that the Department's real objective lies in maintaining a smooth running prison system, not in serving the community's need for public safety. In addition to operating quiet prisons, DOC seeks to project a public image that reflects the currently popular viewpoint on criminal justice issues. Today that outlook is one of being tough on criminals.

Despite an unprecedented prison building binge and the systematic overcrowding of prisoners, not just in Washington state but nationally, the crime rate continues to climb. The state refuses to look at the social roots of this problem, such as high unemployment, widespread poverty, the growing gap between rich and poor, racism, etc., and instead they focus all their attention on the errant individual. "So what," they say, "if capitalism is incapable of providing enough jobs for everyone; the fact that you don't have work is proof that you are scum." In short, you are the sole cause of the problem and must accept all responsibility for it. If this is the situation, then it's time for prisoners to take a modicum of responsibility for changing not only the perception, but the underlying reality as well.

Some prisoners have been working to ensure that we are able to obtain employment when released to the outside world. One means of accomplishing this is to develop the skills necessary for finding a job. While the prison system does have vocational programs it occasionally touts to the public as proof of its efforts to rehabilitate prisoners, these are generally both outdated and ineffective. Here at the Reformatory, for example, we had a vocational machine shop in which all of the heavy machine tools, lathes, etc., came off of a World War II navy ship. Whereas in the real world of modern machining practices, machine tools such as lathes are newly built and guided by computers.

We are already disadvantaged as a result of our status as convicted felons; in order to get hired and to keep a job we almost have to be better at our duties than other workers. Since the hardware available to us for learning job skills is mostly outdated and our access to it limited, we need to focus on learning skills that we can develop in our cells, independently of any state-run program. One of the few ways we can accomplish this is by building computer skills, learned in our cells on personally owned computers. Accordingly, we have been trying to develop our abilities in the computer field by first getting approval for having personally owned computers in our cells.

This has been a long and difficult struggle. In the mid-1980s we spent 2½ years fighting to get permission to have personally owned computers. There was excuse after excuse (space limitations, liability, existing policy, etc.), but with persistence and right on our side we slowly wore them down. Computers were eventually approved and we had them for three years without a single computer-related infraction being issued. During this period many prisoners were able to learn skills they would not have otherwise obtained, and are today working on the streets in the computer field as a direct result of this program.

I will give you one example. Jeff Thompson was a construction worker on the outside. While on the job he fell from a roof he was working on and sustained a serious back injury. Because of his injury, Jeff was physically unable to work. His disability payments were held up by red tape, leaving him both broke and disabled. He turned to dealing "speed" to make ends meet, an activity which ultimately landed him in prison. Jeff's compensation payment finally arrived, years after he was imprisoned. Since his injury prevented him from going back into construction work, Jeff bought a computer and learned how to use it in the privacy of his cell. When he was released he applied for a job in the computer field. Competing for the position were two people who had just obtained Associate of Arts degrees in computer science. After interviewing the two graduates, the employer talked to Jeff for two minutes and hired him on the spot (prior record and all). Why? Because Jeff knew what he was talking about when it came to computers. He had learned his lessons well.

Jeff's story is only one of the successes achieved during the three years we had computers. There are many others. The program was so successful that the Assistant Director of Corrections sent a memo to every prison in the state, authorizing them to implement a similar inmate computer ownership program at their facilities, and he attached a copy of the Reformatory's inmate computer ownership policy for them to use as an example. Notwithstanding this progress and the absence of problems, a new director of the division of prisons was named who opposed the program. He promptly terminated it. We were given thirty days within which to ship our computers out of the prison. Our typewriters were even limited to just one page of memory. An anti-computer hysteria swept the state's prison system.

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That was 3½ years ago. The prisoncrat responsible for the loss of our computer ownership program is now history, and after several years of additional struggle we may again be on the verge of getting the machines back into our cells. But there are problems that will destine the new policy to fail. Rather than take the old policy, the one DOC officials touted as a model for all prisons in the state to use, tweak it here and there where real or potential problems existed, and issue it, prison officials instead wrote a whole new and very restrictive policy. Under this new policy any violation of the rules, however minor, will result in the permanent loss of the inmate's computer. At the same time, under the new policy prisoners are no longer permitted to possess floppy disks. What this means is that the complex program you've been developing for the past six months, the book you've been writing, the legal work you've been doing, cannot be saved on a backup floppy. If your hard drive crashes or fails, as all of them ultimately do, you are out all of the work you've done. It is lost. Rather than put up with such nonsense, convicts will use readily available floppy disks to backup their work. Since that is a violation of the new policy, nearly every prisoner will be subject to the loss of his computer. Our captors will then be able to smugly say, "We tried our best, but those manipulative convicts abused our trust."

In point of fact they have only grudgingly implemented this latest computer policy (if it is actually implemented at all), and they've designed it in such a way as to be sure to fail. Even in the unlikely event that somehow the new computer policy did not fail, prisoners would still have a hard time learning the sorts of things that enabled Jeff to successfully compete on the job market with recent college graduates. The new policy authorizes only three pieces of application software on our hard disks (to be installed by the property room, since we can't have floppy disks). These are a specific brand of word processor, database, and spreadsheet. Jeff learned the most about computers from learning how to program them, using the C programming language. This and other necessary types of software would not be permitted under the new policy.

Will allowing prisoners to have personally owned computers in their cells be coddling people who have offended against society? Herein lies the basis for the seemingly endless debate between efficacy of the punishment versus the rehabilitation approach to crime control. These philosophical concepts mask a very real social question. As demonstrated earlier in the example of the computers, the rehabilitative model has never been more than half-heartedly implemented by prison officials, despite the public's will. Oh, wardens became superintendents, guards became correctional officers, prisoners became residents, and prisons themselves were transformed in to correctional institutions. But other than the verbiage, very little actually changed. The absence of significant progress was blamed as the reason for going back to the punishment approach. The death penalty was restored, prison sentences significantly lengthened, paroles limited, prison living conditions eroded, training programs gutted, and so on. That is where we are at today.

What has this cruel, vindictive, and murderous approach to a social problem netted the community? Washington state's top prisoncrat, Chase Riveland, was recently quoted in the *Seattle Times* as saying "that if the state continues to lock up criminals at its current rate everybody in Washington will be in a prison or working for one by the year 2056." There are some valid reasons for this alarm. The prison population in Washington's prisons jumped 71 percent between 1980 and 1992, while the state's general population increased by only 13 percent. During this 12 year period prison operating costs have risen from $139 million to $700 million. At the same time the public was paying more to lock people up for longer, crime rates in the state continued to increase significantly.

I am not trying to pass personally owned computers off as some sort of penal panacea, but rather as a single example of what can be accomplished if prisoners themselves are able to implement vocational programs. The computers provide prisoners with job skills they would not otherwise have. With decent employment we don't return to prison. Progress is made. More, since the computers are purchased at inmate expense, this progress is made at no cost to the tax-payers. What could possibly be the objection to such programs? Why would prisoncrats oppose implementing or deliberately cripple them?

Conservatives admit that the "get tough" philosophy has not succeeded, but argue that what we need is yet larger doses of the same old ineffective punishment medicine. They will cling to this belief, and have done so historically, until even minor offenses warrant the death penalty. More fear and terror is always their only solution. In feudal England this trend played itself out until such "crimes" as killing a rabbit on private land, cutting down a tree on a public lane, or picking a pocket were capital offenses. The ineffectiveness of this approach was demonstrated by the pick pockets who would ply their trade at the crowd that gathered for the public hanging of a fellow pick pocket. In other words, the punishment mongers will continue to prescribe larger and larger doses of violence, even after such things as jay-walking have become capital crimes subject to summary execution. Is this the kind of society we want to live in? It's the logical outcome of today's justice policies.

One thing is made clear by the overwhelming failure of the punishment approach, and that is that current trends in criminal justice thinking are terribly wrong. The answers are complex and well beyond the scope of this brief article, but a step in the right direction can be taken by allowing prisoners to organize and implement their own rehabilitation programs. When this task has been left to the prisoncrats it has been less than half-heartedly implemented. We as prisoners must take the responsibility for our own rehabilitation. Fighting for access the tools necessary to accomplish this task, such as personally owned computers, is a good step in the right direction. Although working for greater computer access won't by itself make the revolution, it is nonetheless an issue we as rights conscious prisoners should be working on. It is an important step toward our collective empowerment.

BOP Liable for Overcrowding and Opening Detainees Mail

Richard Young is a federal pretrial detainee. While awaiting trial he was housed at the US Penitentiary in Lewisburg, PA. He filed suit claiming that the conditions of confinement violated his right to be free from punishment. The conditions included being confined 23 hours a day, with ten other men, in a converted gym 11 x 31 feet which had no toilets, sink, tables, chairs or drinking fountain. Prison officials also opened his outgoing legal and general mail. The defendants moved for summary judgement on qualified immunity grounds and on the merits. The district court denied their motion in part and granted it in part.

The court noted that pretrial detainees have a right not to be punished. It gave an extensive discussion, with numerous citations, of the rights of pretrial detainees and what conditions, especially in terms of crowding, are lawful. The court denied the defendants qualified immunity by holding Young was kept in far more repressive conditions than convicted prisoners at the same prison. The conditions he was confined under were unconstitutional. The court held all these rights were well established and the defendants were not entitled to qualified immunity because they knew or should have known that their conduct was unlawful.

The court held that BOP officials violated Young's federal rights by opening his outgoing legal and general mail. The district court rejected the BOP's claims that they acted to thwart Young's escape plans by noting they began opening his mail before they received the information about the alleged escape and that mail addressed to judges and court staff are unlikely to contain escape plans. The BOP defendants were denied qualified immunity on this issue as well.

The court dismissed defendants who did not personally harm Young or cause him to be harmed by others. It also ruled that the BOP was not a "person" in the meaning of civil rights jurisprudence and thus could not be sued. See: *Young v. Keohane*, 809 F. Supp 1185 (MD PA 1992).

BOP Can Deny Halfway House Placement

William Lyle is a Bureau of Prisons (BOP) prisoner serving a sentence for firearms and explosives violations. At his pre-release classification review his unit team recommended Lyle be placed in a halfway house for 60 days to ease his reentry into the community. The prison warden rejected the recommendation and denied the halfway house placement saying to do otherwise would depreciate the seriousness of Lyle's crimes. Lyle filed a petition for habeas corpus seeking a federal court order to place him in an appropriate pre-release program for the remainder of his sentence.

The court notes that BOP prisoners must exhaust their administrative remedies before seeking a court review of BOP actions. In this case the parties disputed whether Lyle had exhausted his administrative remedies. Rather than hold an evidentiary hearing and delay the proceedings the court excused the failure and went on to decide the case on its merits.

The court held that congress has barred judicial review of BOP decisions under the Administrative Procedure Act (APA). The court gives a detailed review of the legislative history barring judicial review of BOP decisions. The court held this bar applied retroactively to Lyle's claims.

Thus, the only judicial review of BOP decisions is when the BOP is claimed to have violated the constitution or acted beyond the scope of the extensive discretion it has been granted by congress.

The court held that 18 USC § 3624 (c) (which states that the BOP shall assure that prisoners serve the last 10 % of their sentence, not to exceed 10 months, in conditions that provide a reasonable opportunity to adjust and prepare for reentry to the community), does not create a due process liberty interest. The court notes that every court to consider this question has reached the same conclusion. The court denied Lyles writ of habeas corpus. See: *Lyle v. Sivley*, 805 F. Supp 755 (DC AZ 1992).

DC Not Proper Venue for BOP Suits

James Cameron is a federal prisoner. While at the penitentiary at Terre Haute he suffered a massive heart attack. Prison doctors stated he should receive a low sodium diet. The prison at Terre Haute could not provide a special diet and the warden requested that Cameron be transferred to a prison that could provide it, the BOP regional director denied the transfer request. BOP doctors at Terre Haute again prescribed a low sodium diet and recommended Cameron be transferred to a prison that could provide the diet.

Cameron filed suit in the District of Columbia under *Bivens* claiming that the denial of the low sodium diet violated his right to adequate medical care under the eighth amendment. After the suit was filed Cameron was transferred to the penitentiary at Leavanworth which could provide a low sodium diet, thus mooting his claim for injunctive relief. The district court dismissed Cameron's complaint holding that the BOP defendants were entitled to qualified immunity in their personal capacities and that Cameron had not exhausted his Federal Tort Claims Act remedies in order to state a claim against them, in their official capacities.

The court of appeals for the District of Columbia Circuit vacated the dismissal and transferred the case to the district court in Indiana. The appeals court held that venue was improper in the District of Columbia because no actions or policies emanating from Washington D.C. had affected Cameron. The court gives a detailed discussion of how courts in the District of Columbia should determine if venue properly lies in DC when prisoners sue the BOP for actions that occur elsewhere in the country. See: *Cameron v. Thornburgh*, 983 F.2d 253 (DC Cir. 1993).

S.O.C.F. Chronology

By Chryztof Knecht

[***Editor's Note:*** *(May 1, 1993) What follows is a chronology of events as they unfolded at Lucasville, Ohio, during the April uprising at that facility. It was written by a Lucasville segregation prisoner who wasn't an actual part of the riot, but who was close enough to witness many of the events as they unfolded. This is an on-the-scene and under-the-gun report by a prisoner who is denied access to newspapers, magazines, radio or television.*]

"There is not a single penal institution or reformatory in the United States where men are not tortured 'to be made good,' by means of the black-jack, the club, the strait-jacket, the water-cure, the 'humming bird' (an electrical contrivance run along the human body), the solitary, the bull ring, and starvation diet."

Emma Goldman wrote the above quote 80 years ago. While some of the methods have changed, it's obvious that the behavior modification techniques have only gotten worse. Guard-on-prisoner brutality, murdering prisoners, denying adequate medical care, pitting prisoner against prisoner, trickology, deprivations of this or that, new policies every day (you can have this today but tomorrow it's contraband and next week it isn't), insults, lies and so on.

All of this has been routinely practiced at the Southern Ohio Correctional Facility (SOCF) for some 21 years. The prisoncrats continued to treat us like animals while the bourgeois media plays into the propaganda that we are violent beasts who deserve nothing except total oppression. Finally, the day has come when we have exhibited the "animal" in us. What follows is a preliminary report of the overthrow. The "causes" are self-apparent from some of the demands made.

April 11, 1993, at 3:30 pm: SOCF prisoners have taken hostages on the L-Side prison wing, which consists of eight separate cellblocks and a gymnasium. The entire L-Side is under the control of prisoners. Those who did not participate in the takeover went through the gymnasium, into the yard, and over to K-Side wing. Twenty-three ambulances arrived to remove the dead that were stacked in the prison yard. SWAT teams, Ohio National Guard, City Police and the Ohio State Highway Patrol swarm in and out of the prison gates. Helicopters sweep the prison roofs, capturing those prisoners loose on the compound and roofs. Rumor has it that 3 guards and an estimated 50 prisoners (mostly those who were known informants) are dead.

April 12, 1993: Transport buses enter the compound to transfer prisoners on K-Side to different prisons, making room for L-Side prisoners once they surrender. Approximately nine guards are held hostage, divided into three groups in three separate areas of the L-Side prison wing. Prisoner bodies continued to be stacked outside the gymnasium for the ambulances. Prisoners have been seen to hang from the railings of some of the second ranges of the cellblocks. Negotiations begin. Some prisoners have been seen with their hands up while on the prison roofs, apparently surrendering.

April 13, 1993: Ohio State Highway Patrol helicopter crashes while landing. Prison guards surround the prison perimeter with shotguns. More ambulances come and go, removing dead prisoners. SWAT and National Guard knock a prison cellblock wall down with a bulldozer in an attempt to free hostages. The cellblock was empty. Prisoners left in one cellblock on K-Side begin to riot, protesting inadequate food. Prison guards tear gas the cellblock and leave. SWAT and National Guard landed on the roof of an administrative segregation cellblock with weapons, tripods, etc. Prisoners in three segregation cellblocks set ranges on fire, destroy light fixtures, assault prison guards. Helicopters continue to sweep the prison roofs searching for prisoners. All prisoners on K-Side, except for Death Row and the previously mentioned cellblock, have been transferred. Death toll of prisoners continues.

April 14, 1993: Helicopters grounded; rainy and windy day. Prisoners in the SuperMax segregation unit riot and are removed and separated.

April 15, 1993: Spotlights are shined on L-Side; guards are on prison roofs with weapons, signaling each other. They remain on roofs until following day.

April 16, 1993: Legal mail and a few letters are delivered to prisoners in segregation. Standoff continues.

April 17, 1993: L-Side prisoners enter L-8 cellblock, closing windows and breaking them out. Guards in segregation unit flash shotguns; prisoners in L-8 flash their middle finger at guards. Thirty-two Army trucks enter compound. Helicopters continue to circle prison while ambulances come and go.

April 18, 1993: Standoff continues. Holes drilled in roofs of L-Side cellblock--microphones dropped in.

April 19, 1993: A list of 21 demands are sent out. Negotiating teams agree to all demands and stated over a bullhorn to each block (all night long) that mail and visit policies will be upgraded; no retaliation by guards; attorneys will be provided for all involved; FBI will monitor SOCF; food service upgraded; medical standards will be upgraded; the removal of Unit Management will be "reviewed;" better jobs will be provided; American Correctional Association standards will be implemented; prisoners will sit as advisors for prisoners on disciplinary hearings; integration of prisoners in cells will not be enforced; commissary prices will be reduced; close security prisoners will be removed from SOCF; prisoners wanting transfers to other prisons in Ohio will be reviewed on a case-by-case basis; inter-state transfers will be reviewed via case-by-case; transfers to the custody of the Federal Bureau of Prisons will be reviewed per request of prisoners seeking such; and those involved [in takeover] will immediately be transferred out of SOCF. These are the only ones I could hear on the bullhorn. Pigs stated on the bullhorn that the list of demands had been agreed to and signed (I don't know who signed them).

April 20, 1993: Have not heard anything new except three prisoners came walking out but brought no hostages with

them. There is something like 600 prisoners involved (at least that's what we heard). A letter dated April 12, 1993, from another prisoner indicated that all Ohio prisoners are locked down.

April 22, 1993, Update: Eleven guards were held hostage as of 4-11-93 [*Names of guards are being omitted due to space.*] Three hours after the riot jumped off two guards were released. Guard Vallandingham was hung from his ankles from a cell tier range, mutilated, then hung from his neck until he died. Two other guards were killed but it's being kept quiet. A undisclosed number of inmates were killed--family members said the bodies were wrapped in bed sheets. This whole thing started over TB tests, which lead on to the 21 demands being made.

Thirty-six F.B.I. agents on scene with 500 national guards. The Correctional Institution Inspection Committee (appointed by the Ohio Legislature to oversee prison conditions in Ohio) claimed they had no knowledge of fucked up conditions, racial tensions by guards, etc. Yet I personally wrote them a letter and told them that guards brutalized prisoners and recently beat me, and that by allowing them to continue they were handling a time bomb. They totally ignored my letter then denied knowledge of increased tension to the media.

Prisoners surrendered on April 22, 1993, in groups of twenty with their hostages. Six-hundred prisoners were involved. These prisoners were taken to the gymnasium, finger printed (probably for future prosecution), strip searched, then placed on K-Side in Max Lockdown. L-Side wing is to be destroyed (like it already is!) and rebuilt to resemble something like Super Max lockdown (mini-Marion, Illinois). As of this writing, guards haven't taken count of prisoners since the 11th. Last night (4-21-93) guards tear-gassed L-Side after prisoners surrendered, to make sure nobody was left. At night, all during this shit, prisoner bodies were loaded on buses (I guess so the media couldn't get hip). One prisoner tried to protect a guard and help him escape, but the prisoner was busted and wasted.

Our warden issued a memo to all guards that no retaliation is to be taken against any prisoners. No exact figure on prisoner body count. L-5 cellblock was the execution chamber--snitches were wiped out. Entire L-Side destroyed. Yesterday we heard doors being knocked out. One snitch inmate refused to come out of his cell to be executed so they went in and chopped his head off.

This riot was not racially motivated; Black and White prisoners united and made sacrifices for us. Muslim prisoners and Aryan Brotherhood prisoners along with just white/black prisoners joined.

Observe Prisoners' Justice Day

Traditionally, August 10th has been commemorated by prisoners in Canada as Prisoners' Justice Day (PJD). During the twenty-four hours of August 10th prisoners fast and refuse to work as a show of solidarity in memory of those who have died unnatural deaths in prisons; victims of murder, neglect and suicide. At the same time, community organizations have increasingly held demonstrations, services and vigils in support of prisoners' common resistance against oppressive prison conditions and systems. PJD is also a day when prisoners and their support organizations emphasize their attempts to raise awareness of the brutal and inhuman conditions inside prisons that are responsible for the many unnatural deaths. August 10th is also the day to remember that while many people are sentenced to serve time in prisons, they have not been sent there to die.

PJD was originally to be a one-time concentrated effort by prisoners at Millhaven Penitentiary to show their solidarity on the one-year anniversary of the death of Eddie Nalon. He had bled to death on August 10th, 1975, after the 'panic' button in his segregation cell failed to alert custodial staff as it should have. His desperate bid to bring attention to the unwarranted extension to his stay in solitary confinement by slashing his wrists proved fatal. Howie Brown, his neighbor in Millhaven at the time, decided to initiate what has become a tremendous yearly show of solidarity, which has recently increased on an international scale.

Although not often publicized, prison deaths that occur show just how unnatural and unnecessary they are, whether at the hands of the state, or by other prisoners when they are not taking their own lives. Foremost among the modes of death is the death penalty, which is still being used by many states claiming to be developed and progressive. Then there are many prisoners who die as a result of excessive force used by police and prison staff, who have proven they are accountable to no one. It has also been determined that the majority of prisoners with HIV/AIDS live only half as long as if they were living in the community with the illness. Many deaths also occur as a result of negligence of health care personnel, who often fail to diagnose fatal illnesses, and are slow to respond to emergency situations. And then there are the many senseless and brutal murders by other prisoners, precipitated by often minor disputes that reflect their common feelings of powerlessness, fear, anger and rage. All of these deaths can and must be prevented with changes in current methods of criminal justice and prison systems that prisoners demand on August 10th of each year.

PJD is the day when prisoners and their support organizations emphasize Publicity of their long list of demands. A general overview of that list is:

- Abolition of the death penalty and inhumane life sentences.
- Abolition of arbitrary measures used by prison staff and administrators.
- Recognition of prisoners' human rights and dignity.
- Implementation of a means to hold all justice systems personnel accountable.

Continued on next page...

- To create a more humane and positive environment in prisons while ultimately working towards prison abolition through restorative justice methods.

In 1992, for the third consecutive year, the Prisoners' Justice Day Committee of Toronto produced a radio program of prisoners' and ex-prisoners' writings in support of the PJD effort. The pre-taped program was aired by 22 radio stations across Canada to raise public awareness of PJD and to publicize prisoners' demands. The Committee had sent out notices to prisoners and their support groups calling for written submissions for the radio show. The Committee's efforts resulted in the building of a loose network of prisoners and support organizations. With some work in building a stronger network, PJD promises to become a much greater show of solidarity world-wide. And it will create the force necessary to smash down the prison walls of barbed-wire, steel, concrete and prejudice.

Although some people are aware of PJD and the brutal conditions that result in so many unnatural prison deaths, not enough are aware of the significance of this, neither do they recognize PJD efforts. A much broader show of solidarity through fasting and work strikes in prisons, and demonstrations, services and vigils in the communities would create the public awareness necessary to effect the positive changes to stop the needless dying. As an individual and/or organization, prisoners everywhere need for you to give support by showing your solidarity on August 10th in memory of those who have died unnatural deaths in prisons. Please do so not only in thought and work but through positive action as well.

For more information contact: Zoltan Lugosi, Box 4510, Kingston, Ontario, Canada K7A 5E5.

Adequate Notice of Disciplinary Charges Required

Henry Benitez is a New York state prisoner. He was infracted in a four page disciplinary report for allegedly violating eight different rules. A few hours later he was given another infraction report consisting of an additional four charges. A few hours later Benitez was placed in segregation and not allowed to bring the infraction reports with him. At his disciplinary hearing he objected to the lack of written notice saying he was unable to prepare his defense. The hearing officer rejected this and found Benitez guilty of 11 of the 12 charges. Benitez was sentenced to six months segregation, loss of good time and loss of telephone privileges.

Benitez filed suit claiming that the lack of advance written notice violated his right to due process. The district court ruled that it did not, but, even if it did the defendants were entitled to qualified immunity for their actions. The court of appeals for the second circuit affirmed the dismissal on qualified immunity grounds but held that the lack of notice did indeed violate due process.

The court gave a detailed explanation of the minimal due process required in a prison disciplinary hearing, especially as it pertains to advance notice of the charges against the prisoner. The court ruled that prisoners must be given advance written notice of the charges against them and, most importantly, be allowed to retain the written notice at least 24 hours in advance of the hearing. The court held that this right was not clearly established therefore the defendants were entitled to qualified immunity from money damages. See: *Benitez v. Wolff*, 985 F.2d 662 (2nd Cir. 1993).

Judge Cannot Make Credibility Findings

Roland Pettengill is an Arkansas state prisoner. While in segregation he went to yard. Before entering the yard he alerted sergeant George Veasey that an enemy of his was in the yard. Veasey gave Pettengill the choice of going to yard with his enemy or refusing. Pettengill went to yard and was attacked, kicked and beaten. Veasey then refused to take Pettengill to the prison infirmary to receive treatment for his injuries. Pettengill filed suit under § 1983 claiming these events violated the eighth amendment.

At an evidentiary hearing a magistrate heard vastly conflicting stories. The guards testified that Pettengill had not told them his enemy was in the yard, that he was the aggressor, received no injuries and did not request to go to the infirmary. Pettengill and his witnesses testified to the contrary. The magistrate judge ruled in favor of the guards, accepting their version of the facts, and recommended dismissal of the suit. The district court agreed and dismissed the suit.

The court of appeals for the eighth circuit reversed and remanded. The appeals court held that because Pettengill had requested a jury trial the magistrate had "erroneously made credibility determinations resolving direct factual conflicts in favor of Veasey without assuming as true all facts supporting Pettengill which the evidence tended to prove and without giving Pettengill the benefit of all reasonable inferences." Because a reasonable jury could conclude that Veasey had in fact violated Pettengill's constitutional rights, the district court had erred in dismissing the suit. See: *Pettengill v. Veasey*, 983 F.2d 130 (8th Cir. 1993).

PA Prison Expansion Fails to Cut Crime

A recent report prepared for the Pennsylvania State Commission on Sentencing found that a dramatic increase in the state's prison population has not reduced violent crime.

The report, *Incarceration and Crime: Facing Fiscal Realities in Pennsylvania*, by Penn State University Professor Darrell Steffensmeier, found that between 1980 and 1991 the prison incarceration rate rose 171 percent and the violent crime rate increased nearly 25 percent. During this period, the state Department of Corrections Budget rose 263 percent.

Steffesnmeir concluded: "Using incarceration as the primary sanction for the bulk of offenders does not appear to be justified given what we do know."

Corrections Today, April, 1993

From the Editor

By Paul Wright

Welcome to another issue of *PLN*. As you will have noticed, *PLN* has a new look. We are trying out this new, expanded format because we had pretty much exhausted the newsletter format and had a backlog of material. This new magazine format costs us about the same as photocopying for the first thousand copies but we can now print 16 pages a month with no problem. It also lessens the work for our volunteers as there is less folding or stapling involved.

The drawback is that this has doubled our printing costs compared to what we had been spending due to the extra pages. Because there is a minimum print run of 1,000 copies and we only have about 650 US subscribers, we have quite a few excess copies left over. That's the bad news, the good news is that once we go over a thousand copies the printing gets a lot cheaper and we can start saving money on printing costs. We will be disposing of the excess copies by sending them out as samples to potential subscribers.

We also ask that you, our readers, encourage any friends, family members or other interested parties to subscribe to *PLN*. Anyone interested in buying bulk copies of *PLN* for distribution at events, bookstores, etc., please contact Ed or myself to work out the details. Encourage your local library (in prison or out) to subscribe at our institutional rate. We need paying subscribers that can cover their subscription costs to continue printing in this magazine format. Until now *PLN* has been limited by its format into not being able to print lengthier articles or even everything that we would have liked. Over the years we had to make decisions not to print a lot of good material due to a lack of space because we prioritized other materials or it was too big. It would be a shame if we couldn't afford this new format and had to go back to our photocopied format.

I want to emphasize to you that all of your donations go towards producing, printing and mailing *PLN*. The more money we have the more we can afford to do and this will be reflected in the product you get to read. Readers that have been with us a while will remember that when we started *PLN* was a hand typed 10 page newsletter. It's taken us three years to get to this point as we've gone slow and not overextended ourselves. Through this period we've always gone forward and want to continue doing so. We need your ongoing support to keep publishing. As always, we welcome comments and suggestions from our readers.

Recently we have had some problems getting *PLN* delivered to our subscribers at the Pelican Bay State Prison in California. Copies of *PLN* were returned to us as "undeliverable" because they did not have the subscribers' cell number on the address. We usually don't put prisoners' cell numbers on the mailing label due to the frequency of cell moves within prisons. In some cases the labels did have the cell number and all have the prisoners' DOC number. I wrote to the warden, Charles Marshall, to complain about this and his reply was, to say the least, interesting. First, he started out by claiming 300 to 500 copies of *PLN* were delivered to Pelican Bay each month requiring "6 hours of staff time" to put cell numbers on. According to our mailing list we only have about 36 subscribers at Pelican Bay, so who knows where the other 460 copies are coming from. To resolve this problem we sent Marshall a listing of our Pelican Bay readers and asked that he return it with their cell numbers and we would add them to our mailing list. This is the only prison in the US we are having this problem at. We have a few readers at most California prisons and only at Pelican Bay has this been an issue.

While I'm on the subject of Pelican Bay, of the 36 subscribers there, only 3 are covering the cost of their subscriptions. We understand that those readers in the SHU have a real problem getting money to donate for *PLN*, but if you can borrow someone's copy please don't ask for a free subscription. If you're in the SHU or getting a free subscription to *PLN*, ask friends or family on the outside to donate to us on your behalf. Our continued existence, especially as a magazine, will depend on your support.

On a closing note, prison artists interested in contributing artwork for our 1994 prisoners calendar should get with us as soon as possible. September is the printer deadline for this. We need prison related art (please, no clenched fists through the bars!) that's in black and white in a landscape (horizontal 11 by 8 1/2) format. Please contact Ed or myself if you're interested in participating. Enjoy this issue of *PLN* and pass it along to others when you're done with it. As always we encourage articles and submissions from you, our readers, so keep them coming.

White House Pot Baron

By Paul Wright

The March 9, 1993, edition of the *Seattle Times* reports that Arizona businessman Walter McCay made his fortune growing massive amounts of marijuana. What was interesting about McCay is that he is a prominent Republican businessman and banker who worked for several years as Ronald Reagan's advance man (smoothing travel, security and related things) when Reagan traveled.

In 1990 police in Yuma, Arizona, raided a pot growing operation in a house, seizing 450 pounds of pot. The grower confessed that McCay was the owner of that and many other pot growing operations.

When confronted by police at one of his pot farms during a raid McCay confessed to a long list of drug crimes. This included growing large amounts of pot in Arizona and California, storing pot in his house, using chauffeured US embassy cars in Germany to go to Amsterdam to buy high quality pot seeds to bring back to his growing operations, laundering drug money through banks he was a director of and setting up front businesses to launder drug profits. During this period McCay was also a Maricopa County Sheriff's deputy.

Continued on next page...

To quote the *Seattle Times*: "McCay was never arrested. He faces no federal charges, even though he exploited his positions at the White House, the Maricopa County Sheriff's Office and a Scottsdale Bank. Unlike a Hawaii couple that helped him run the operation, McCay will spend no time behind bars. And although McCay confessed to storing marijuana in his house - an action usually considered grounds for property forfeiture- prosecutors have not seized the house."

After confessing to the above crimes McCay turned snitch and, wearing a microphone, obtained incriminating statements from his underlings that he employed to work in his drug ring. Twenty-two people were indicted by federal prosecutors. One of the indicted committed suicide and charges were dropped against 2 others, including one who plead guilty to state drug charges. The threat of McCay's testimony and the evidence he had gathered was sufficient to induce many of his former employees to plead guilty and be sentenced to prison.

MCcay was never arrested. He was charged in Yuma county court and in October pleaded guilty to charges of conspiring to produce and offering to sell marijuana. He was sentenced to three years of unsupervised probation. None of his property or drug profits and money have been seized by state of federal officials and they claim no intent to do so.

A frequent theme in *PLN* is that there are two systems of justice in the United States and other capitalist countries: one for the poor and one for the rich. I, for one, think that this is a pretty obvious proposition and you don't have to be a rocket scientist to figure it out. Part of the system's charade though is in maintaining the fiction that "justice" is equal for everyone rather than admitting that people get as much justice as they can afford, or as one wit put it "we have the best justice system money can buy." Anyone who doubts this has only to read the mainstream media and note the disparities in how the rich are treated as opposed to how the poor are treated.

Bertolt Brecht asked "Which is the greater crime, to rob a bank or to own one?" The lesson of the savings and loan rip off where bank owners looted over 600 billion dollars from banks and financial institutions, is that you're not going to do anywhere near the prison time if you are caught looting a bank. Thousands of bank officials and directors, with the connivance of government regulators,accountants, etc., made the savings and loan debacle possible. To date only a few hundred have been charged with criminal violations. The average sentence of those who do go to prison is between 2 to 4 years in prison, and when I say "prison" I suspect these guys aren't going to Marion, Lompoc or the other penitentiaries.

Many of the S & L looters pleaded guilty to criminal charges and agreed to pay substantial amounts of restitution in exchange for reduced prison sentences. A recent article by the Associated Press showed that, surprise, virtually none of the looters had paid a penny in restitution and in interviews claimed they wouldn't be able to due to financial problems. I contrast this with friends of mine who have up to 80 % of their meager prison wages of 38 cents an hour seized by the DOC as "restitution." Earning $50 a month isn't a "financial problem" to bar paying restitution, I suspect the S & L types are earning a bit more than this.

Any discussion of the criminal justice system (and that's exactly what is) has to start from the premise that without economic and social justice there will be no justice in the criminal area of law. These issues are inseparable, you can't have one without the other. As long as one class has the guns and money the other class is going to get the shaft and prison.

Notice of Appeal Filed When Given to Prison Officials

Samuel Hamm is a Missouri state prisoner. While employed as a prison law clerk he claims prison officials threatened and harassed him in retaliation for the performance of his duties. The defendants' conduct included threatening him with administrative segregation, infracting him for fictitious conduct, violating his due process rights at disciplinary hearings, not protecting him from attack by HIV+ prisoners, and knowingly allowing him to be exposed to prisoners with tuberculosis. He was not, however, fired from his job. Hamm filed suit under § 1983 claiming that this conduct violated the right of other prisoners to receive his assistance in their legal actions. The district court granted summary judgement to the defendants and dismissed the suit.

Hamm had until November 1, 1991, to file his notice of appeal to appeal the suit's dismissal. He had the appeal notice notarized on October 31, 1991, and gave it to prison officials on that day to mail to the court. It was received and filed by the district court clerk on November 4, 1991.

The court of appeals for the eighth circuit held that a pro se litigant's notice of appeal is considered timely filed as long as a prisoner gives it to prison officials within the 30 day period fixed by Fed.R.App.P. 4(a). Once a prisoner gives the notice of appeal to prison officials for mailing he has lost control of it and cannot be responsible for any delays in its getting to the court. The court cites U.S. Supreme Court rulings and decisions from other circuits reaching this same conclusion.

After finding that it did have jurisdiction to hear Hamm's appeal the court affirmed dismissal of the suit.

The court held that because Hamm had no constitutional right to a prison job, or its conditions, he could not state a claim for relief because the defendants had not actually fired him. Holding the case was controlled by *Flittie v. Solem*, 827 F.2d 276 (8th Cir. 1987), the court ruled prisoner law clerks lack standing to assert the rights to legal assistance of other prisoners. In a concurring opinion, Judge Loken stated that "when the harassment of a law clerk adversely affects the client's right of access, it is the client whose constitutional rights are violated and who is therefore entitled to § 1983 relief." See: *Hamm v. Moore*, 984 F.2d 890 (8th Cir. 1992).

GRAPO Prisoners Tortured

By Paul Wright

All too often we hear about the physical mistreatment and abuse of prisoners, political and social. The impression we are given by the mainstream media and the governments of the western industrialized countries is that such abuses only occur in places like the Middle East, South America, etc., and that such things are unheard of in the western countries that call themselves "democracies." As readers of *PLN* know, physical abuse and mistreatment at one level or another is the norm in the US.

The level of mistreatment and abuse of prisoners and social activists proportionally increases depending on the strength of the movements that are confronting or challenging the established political and economic order. The bigger the challenge the harsher the methods that will be used to crush it.

Spain has been a nominal "democracy" since 1975 when fascist dictator and loyal US ally, Francisco Franco, died. Spain has a large and active communist and anarchist left and labor movement. It also has several nationalities struggling for independence from the central government. The result of these struggles is that Spain has over 700 political prisoners (PPs). The majority, over 600, are affiliated with the Basque independence struggle. The next largest group, about 55 PPs, are members of the PCE(r) (Communist Party of Spain, reconstituted) and GRAPO (Anti Fascist Resistance Groups, First of October). The remainder are anarchists, labor activists and nationalists from the other liberation struggles being waged against the Spanish state.

Like all capitalist countries, the treatment of PPs in Spain ranges from bad to barbaric. Over the years *PLN* has briefly reported on the struggle for better conditions in the Spanish gulag. The last several months have seen a general crackdown on leftist and nationalist activists and groups. This includes the arrest of three members of AFAPP, an organization that supports the human rights of political prisoners in Spain. The family members arrested were accused of being members of the PCE(r). The "evidence" against them consists of address books and copies of the PCE(r)'s clandestine magazine.

After a shootout between Spanish police and a GRAPO commando in which some members of the commando escaped, Spanish police arrested Elvira Dieguez and Laureano Ortega. They were accused of "membership in an armed band." Dieguez had been released from prison in 1989 after serving 12 years for GRAPO activities. At her court appearance Dieguez showed obvious signs of torture and described the torture she had undergone at the hands of the Spanish police.

She states she was hooded with a plastic bag and blindfolded throughout her ordeal. Her clothes were forcibly ripped off her body and she was beaten. Her ordeal lasted for roughly five days and she was tortured in the city of Santander and Madrid. In Madrid, naked and in cold cells, she was beaten some more, her body wet down and she was shocked with cattleprods, the soles of her feet were beaten and she was raped with a broomstick. Throughout the experience she was being insulted and screamed at by Spanish police officials.

At his court appearance Ortega described a similar experience except he was not raped. Their lawyer vigorously denounced the torture and called a police doctor as a witness. The doctor testified that the prisoners injuries were consistent with their testimony of being tortured.

Despite the torture neither Dieguez nor Ortega made any incriminating statements and both were freed by the Spanish court that handles political cases for a lack of evidence. The judge said he would give further consideration as to what he would do about the prisoners being tortured. If past experience is any guide, nothing will be done. Torture of political dissidents in Spain, England, France, Turkey and other NATO countries is well documented. Some countries, including Spain and England, operate military and paramilitary death squads that routinely kill political dissidents. Yet again, nothing is done.

The most startling thing about these events is the deafening silence from the so-called human rights community. Where are the denunciations of the Spanish government for their arrest and torture of political dissidents? Some groups like Amnesty International claim to oppose the torture of all prisoners, regardless of political views, yet when communists are being raped and tortured in "democracies" nothing is said.

Whenever capitalist governments are challenged by groups and parties that question the status quo and seek meaningful political, economic and social change, they are ruthlessly crushed. The stronger the challenge the more brutal the means. That is a constant. The hypocrisy of the western governments who claim to support human rights needs to be continuously exposed for the sham it is.

Basque Prisoners on hunger Strike

On January 31, 1993, five Basque political prisoners in the Spanish prison of Caceres-2 began a hunger strike protesting their abysmal conditions of confinement. They have presented prison officials with a list of 22 demands, all of them relating to their living conditions. After the first ten days, the prisoners had already lost between 14 and 18 pounds and had begun to suffer minor health problems.

The prisoners have denounced the hostile and contemptuous attitude of the prison administration. An attitude which translates into a total abdication of responsibilities on the part of the prison's medical staff. Among other things they criticized the fact that on the first day of the strike medical staff did not conduct a physical exam, which is necessary to measure the effects of the strike on each prisoner. Yet on that same day prison officials forced one of the prisoners to remain in his cell together with a tray of food.

Continued on next page...

They have reported threats and insults by prison officials. Medical staff have taken their pulses without instruments and ignored their complaints.

The list of demands include: a monthly phone call with the right to speak in Basque; monthly visits; a daily 10 minute shower; regrouping of the four prisoners together in one unit; an end to censorship and mail limits; delivery of newspapers and publications; an end to strip searches and abuses of authority by guards; that they be present during cell searches and their property be respected; that lights remain on longer or light switches be placed in the cells. As we go to press we don't know the outcome of the strike. Basque political prisoners, over 600 in Spain alone, are subjected to harsh conditions of confinement because of their political views. In response to this they have maintained a long struggle for better conditions and against the more abusive aspects of the prison regime.

Costa Rica Drops Extradition Treaty With US

On January 13, 1993, the Costa Rican Constitutional Court issued a ruling suspending application of its 1982 extradition treaty with the US because of a June, 1992, US Supreme Court ruling which authorizes the US to kidnap individuals in other countries in order to bring them to trial. Since extradition is defined as the only valid procedure in Costa Rica for bringing suspects to trial in another country, the judges said the US ruling constitutes a violation of Costa Rican law and national sovereignty.

Costa Rica's constitution also guarantees foreigners the same rights and protections as citizens. The controversial decision came in conjunction with the court's favorable ruling on a writ of habeas corpus presented on December 18, 1992, by James Karls, a US citizen wanted in Wisconsin on homicide charges. The US has requested that Costa Rica extradite Karls.

In January 14, 1993, comments to reporters, Costa Rican foreign minister Bernard Niehaus confirmed that the San Jose court's ruling, which makes application of the extradition treaty illegal, could have serious repercussions on relations with the US. However, he said it was possible that the existing extradition treaty could be modified.

Source: *Weekly News Update*

Letters from Readers

Won't Debrief

This letter is a request to continue receiving *PLN*. I'm a convict serving a life sentence, confined within the SHU (hole) without a release date due to my continuous refusal to debrief (become an informer). Because of these unjust circumstances, I am unable to afford the cost of a subscription. You can rest assured that any/all copies sent my way will continue to be circulated amongst the convicts within my vicinity.

I believe you know how much your continued assistance is most needed and appreciated. I thank you.

R.R., Pelican Bay, CA

Arizona Court Access

I am in receipt of your March issue of *PLN*, and find that the info is/will be very useful.

In regards to Access to the Courts (*Casey v. Lewis*), I feel I should inform you of some facts about the above. This thing, access to the courts, all started with *Gluth v. Arizona DOC, et al. Gluth* only covered the central unit. The rest of the prisons in Arizona were still at the mercy of the DOC. Now that *Casey* is in effect, all of Arizona is covered.

On paper all looks good, but in reality let me tell you what the real deal is:

In the central unit, and in all max/super max units, prisoners do not have direct access to books/policies. They have to ask a library clerk for the books they want, and in most cases, if they don't know which book they need, they're SOL.

According to *Gluth* and *Casey*, if you are placed on deadlock you are still supposed to have access to the law library unless you're dangerous, etc. Then, they (the prison) are supposed to bring you any material (books, policies, supplies) that you may need. But guess what? First, the prison treats ALL DEADLOCKS the same, and they don't go to the law library. If you have a court deadline, you're visited by a law clerk every day. If not, you have to submit a kite to the law library and you *might* see someone in 3 to 5 days. Whenever you do see someone they'll tell you that you are not allowed to have books and that they'll bring you copies of case law, etc., as soon as they can, which could be the next day or five days and sometimes not at all. Now, say you need to look at the fifth amendment and you ask the clerk: "hey, I need a copy of the fifth amendment." The clerk says "they won't let me copy the whole thing, what part do you need?" "I don't know, this case just refers to the fifth." The clerk says: "Well, I'll copy some of it and bring it back to you in 2 or 3 days, and if its not what you want, just submit another kite..."

Oh yes, keep in mind that you can be deadlocked for ANYTHING, or being suspected of anything. So now a prisoner feels he's being wronged, and files suit and the suit is good and threatens the DOC. Well no problem, they deadlock the prisoner (he may or may not find out what he's in deadlock for) and now has to litigate from his cell and will get the materials the DOC wants him to have.

There are several other things which deny court access but the above is, I feel, the most important.

One last thing, there is a special master and an assistant. The assistant works for *them*, and I'm sure the main guy does too. They are SUPPOSED to be the court's watchdogs.

R.C. Arizona State Prison, Florence, AZ

Moorish Appeal For Your Support

Members of The Moorish Science Temple of America, who are incarcerated in the penal institutions in the state of Indiana, have received much opposition and are being continuously denied the right to practice our religious beliefs, to hold religious services by the Indiana Department of Corrections as Moslems and followers of Prophet Mohammed. The Indiana Department of Corrections officials have

Continued on back page...

expressed themselves as being opposed to our propagation of the Islamic religion as taught by Prophet Noble Drew Ali.

Whatever the reason may be for their discrimination against the members of The Moorish Science Temple of America, which has Temples and Branch Temples throughout the United States and Branch Temples in both federal and state institutions, except the state of Indiana.

The Indiana Department of Corrections does not have the legal right to deny members of The Moorish Science Temple of America equal protection of the law as afforded to other religious organizations within the Indiana Department of Corrections. We appeal to each of you to support us in a positive effort to stop this discrimination and grave injustice, because the first amendment, equal protection of laws, and the American constitution swings open the door to religious freedom to all alike and so each may worship as they desire. Without religious freedom, no search for truth could be possible. Without religious freedom there would be no inspiration to lift our heads and gaze with fearlessness into the vast beyond, seeking hope eternal.

It is a sad weakness in us all that the Indiana Department of Corrections oppose members of The Moorish Science Temple, while affording religious freedom to the Jews, Christians, Indians, and the American Muslim Mission.

Possibly in time the Indiana Department of Corrections will no longer discriminate against members of The Moorish Science Temple and will no longer deny us equal protection of the law as is afforded to other religious organizations within the Indiana Department of Corrections and prove that in mankind tolerance is better than unwarranted opposition.

We, members of The Moorish Science Temple of America, within the penal institutions throughout the state of Indiana deeply appreciate and pray to Allah that; our loved ones, friends, supporters, leaders, religious leaders, Moslem brothers, and sisters would write appeal letters opposing the denial to practice our religious beliefs and stop the religious discrimination against the members of The Moorish Science Temple of America within the Indiana Department of Corrections and encourage the commissioner to afford us religious rights and equal protection rights as they do with The American Muslim Mission, Jews, Christians, and Indians.

Send letters of support to:

Governor Even Bayh
Officer of Governor
Indianapolis, IN 46204

and

Commissioner
Department of Corrections
804 State Office Building
Indianapolis, IN 46204

Send a copy of your letter to:

Taajwar Kafeel Rasheed-Bey # 10006
Indiana State Prison
P.O. Box 41
Michigan City, IN 46360

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Prison Legal News

Working to Extend Democracy to All

Vol. 4, No. 7 July 1993

No Qualified Immunity for Medical Indifference

Dennis Hamilton is an Alaska state prisoner. After an ear operation prison officials tried to fly him to a federal prison in Oklahoma. The trip was aborted after the first leg of the trip due to extreme ear pain caused by flying. Hamilton's doctor wrote prison officials stating Hamilton should not be allowed to fly until his medical condition stabilized. Despite this information prison officials again scheduled him to fly. Hamilton lost an administrative appeal and filed, and lost, a state court appeal to halt the move.

Hamilton's ear was again operated on, to repair the damage from the first flight. A few days later prison officials notified him he would be flown to Oklahoma. Prison officials obtained an opinion from a DOC contract physician who stated Hamilton could fly immediately after the operation. The DOC physician never examined Hamilton, his medical file nor consulted his treating physician. Hamilton was flown to Oklahoma and the flight, as predicted, caused him severe, permanent hearing damage. Hamilton filed suit under § 1983 claiming his eighth amendment rights had been violated.

Prison officials filed for summary judgement claiming Hamilton had failed to allege a cause of action or, if he had, they were entitled to qualified immunity from money damages. The district court rejected both arguments.

The court of appeals for the ninth circuit affirmed the lower court in its entirety and remanded the case for trial. The court discusses the right of qualified immunity and notes that the law regarding the medical treatment of prisoners has been clearly established since 1977. It is clear that the government is required to provide medical care to prisoners, and officials who act with "deliberate indifference" to a prisoner's serious medical needs violate the eighth amendment.

At page 1066 the court states: "A finding of deliberate indifference necessarily precludes a finding of qualified immunity; prison officials who *deliberately* ignore the serious medical needs of inmates cannot claim that it was not apparent to a reasonable person that such actions violated the law." "In order to determine whether summary judgement was properly denied, we need only determine whether the plaintiff established a genuine issue of fact as to whether the defendant prison officials were deliberately indifferent to his medical needs."

The defendants argued that they did not show deliberate indifference to Hamilton's medical needs because they relied on their contract physician's advice. The appeals court soundly rejected this argument by noting that the defendants chose to ignore Hamilton's past experience with ear pain and injury while flying as well as the advice of his treating physician. "By choosing to rely upon a medical opinion which a reasonable person would likely determine to be inferior, the prison officials took actions which may have amounted to the denial of medical treatment, and the 'unnecessary and wanton infliction of pain.'"

The court also held there was sufficient evidence to hold the prison warden, DOC classification chief and Deputy DOC Commissioner liable because they had supervisory authority over inmate transfer decisions and were personally involved in Hamilton's case and had denied his appeals. See: *Hamilton v. Endell*, 981 F.2d 1062 (9th Cir. 1992).

Lack of Treatment States Claim

Charles Watson is a Maine state prisoner. Prior to entering prison he injured his hand. Once imprisoned he sought medical treatment for his hand injury. A prison nurse examined him and refused treatment, saying the DOC was not responsible for injuries incurred before confinement. Watson eventually received treatment and had surgery. Watson filed suit under § 1983 claiming the delay in treatment violated his eighth amendment rights. He also complained of a lack of proper treatment for a back injury and destruction of cassettes he had ordered in the mail. The district court dismissed the complaint as being frivolous.

The court of appeals for the first circuit affirmed in part, vacated in part and remanded. The appeals court affirmed dismissal of Watson's claim concerning his cassettes and his back injury.

The court reversed dismissal of the complaint pertaining to the hand injury. The court noted that the deliberate refusal to treat a prisoner's serious medical condition is not justifiable. Deliberate indifference to prisoner's medical needs violates the eighth amendment. Wanton decisions to delay or deny care, where the action is reckless and requires actual knowledge of easily preventable, impending harm, demonstrates deliberate indifference.

While Watson's claim may ultimately prove meritless, his claims are not frivolous and he is entitled to present them to the court. See: *Watson v. Caton*, 984 F.2d 537 (1st Cir. 1993).

Equal Protection for Handicapped Explained

Wheelchair bound prisoners at the Iowa State Penitentiary (ISP) filed suit concerning denial of physical access and programming because of their disability. The parties settled most of the problems in a consent decree. The one issue not settled was prison officials' refusal to provide in-cell cable TV access to handicapped prisoners in ISP's Special Needs Unit. The district court found that this refusal to provide in-cell cable TV, which is available to all other ISP prisoners, violated the prisoners' constitutional right to equal protection. The court entered declaratory and injunctive relief in the prisoners' favor.

The court of appeals for the eighth circuit reversed. The appeals court gave a detailed explanation of equal protection rights and how it applies to prisoners and the disabled. The court held that the Americans with Disabilities Act 42 U.S.C. § 12101 and Iowa Code 601A do not alter the standard for constitutional equal protection claims.

The court noted that prisoners have no fundamental right to in-cell cable TV, and held that wheelchair-bound prisoners are not a suspect class. Thus, prisoners' equal protection claims are reviewed on a "rational basis" standard. Under this standard the prisoners will prevail if: 1) they are similarly situated with persons who are treated differently by prison officials; and 2) prison officials have no rational basis for the dissimilar treatment.

The court held that the plaintiffs were similarly situated with other ISP prisoners who did have TV. But applying its "rational basis" test, it found "state action is presumed constitutional and 'will not be set aside if any set of facts reasonably may be conceived to justify it.'" "We will uphold challenged state action so long as it bears a rational relationship to a state objective not prohibited by the constitution."

Finding no evidence of invidious discrimination, the court ruled it would defer to the judgement of prison officials in refusing to provide in-cell cable TV to handicapped prisoners. What is indicative of the blind deference being given to prison officials in this case is that the defendants do not state why they refused to provide the in-cell cable access to these prisoners. The opinion is clear that cost was minimal and could have been easily accomplished. See: *More v. Farrier*, 984 F.2d 269 (8th Cir. 1993).

Reduction in Damages Improper

Harry Weeks was a parapeligic Ohio state prisoner. For a two year period Weeks was housed in a control unit at the Southern Ohio Correctional Facility (SOCF) at Lucasville, OH. The control unit did not permit Weeks to have a wheelchair. L.R. Chaboudy was the prison doctor during this period and he had the authority to admit Weeks to the prison infirmary where he would have had use of a wheelchair. Chaboudy knew Weeks was in segregation without a wheelchair, refused to admit him to the infirmary and took no steps to provide Weeks with a wheelchair. Without a wheelchair Weeks could not come out of his cell, take showers, clean his cell or his person. Weeks filed suit under § 1983 claiming Chaboudy had violated his eighth amendment right to medical treatment by not admitting him to the prison infirmary.

The district court granted summary judgement to Weeks, finding his eighth amendment rights had indeed been violated and awarded him $50,000.00 in damages. The district court then reduced the damages to $5,000.00, holding that other prison officials, who were not parties to the suit, were also responsible for Weeks' situation. The court denied Chaboudy qualified immunity and also granted Weeks injunctive relief.

Both parties appealed and the court of appeals for the sixth circuit affirmed in part, reversed in part and remanded.

The appeals court upheld the finding of liability against Chaboudy. The court noted that a determination of deliberate indifference to prisoners' medical needs does not require proof of intent to harm nor a detailed inquiry into the defendant's state of mind. Because Chaboudy knew of Weeks' condition, could have admitted him to the infirmary but refused to do so, he showed deliberate indifference to Weeks' serious medical needs. The court rejected the argument that Weeks' paralysis, caused by a mental disorder, was not a serious medical need by observing that mental illness is just as "real" as other illnesses. Based on his long experience as a prison doctor it was clearly foreseeable by Chaboudy that Weeks would be forced to live in squalor if not admitted to the prison infirmary. The court affirmed the denial of qualified immunity by noting it was clearly established at the time the incident occurred that deliberate

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With the gracious assistance of mailing helpers Michael Misrok, Carol Abby-Pierce and Cindy Susat. Thanks to the University Friends Center (4001 - 9th Avenue N.E.) in Seattle for the use of their space to do the mailing. We invite anyone interested to join us at the mailing party held on the last Tuesday of each month at 3:30 p.m. The mailing lasts for about one hour. We hope to be seeing you there....

indifference to the medical needs of parapeligic prisoners violates the eighth amendment.

The appeals court ruled that the district court erred when it reduced the damages awarded against Chaboudy. The court gave a detailed discussion of joint and several liability in civil rights claims. The court held that for Weeks to recover the full amount of damages awarded against Chaboudy he had only to show that Chaboudy was the proximate cause of his injury. That other prison staff were aware of Weeks' predicament would render them liable *as well*, but would not diminish Chaboudy's own liability.

The court held that it was improper for the lower court to award injunctive relief because Weeks had been released from prison and there was no likelihood he would be subjected to such conditions again. It was also possible that Weeks had recovered and no longer needed a wheelchair, thus the controversy was moot for injunctive relief purposes. See: *Weeks v. Chaboudy*, 984 F.2d 185 (6th Cir. 1993).

Racism and Treatment

By Terrance Hazel

The Texas Department of Criminal Justice's (TDCJ) present method of administering Substance Abuse Treatment Programs (SATP) discriminate against Black and Hispanic inmates. Black and Hispanic prisoners are:

- 71 percent of inmate population (35,000+)
- 80 percent of that 71 percent have serious drug problems (20,000+).

Yet TDCJ (as of Spring '92), despite overwhelming evidence (Davis & Tunks, 1991; Desmund & Maddux, 1984; Grant, 1992) that 'Cultural Sensitivity' improves the likelihood of positive treatment outcomes:

- Had one licensed Black/Hispanic SATP counselor for 45+ prison units, and over 50,000 inmates.
- Refuses to acknowledge Cultural issues (i.e. Cultural Correlates and Risk-Factors).
- Uses no Culturally Sensitive materials in their SATPs.
- Brings new prisons on-line without any treatment staff.

There is no doubt that Black and Hispanic addiction issues get no priority. The amount we spend to incarcerate one person, with no positive outcome, would treat two or three addicts, and educate at least one child through Harvard.

Several recent studies found that "...urban youth laugh at current mainstream attempts to reach them. (Juzang, *The MEE Report; Reaching the Hip-Hop Generation.*) While the Texas Youth Commission found "Widespread differences in the treatment of minorities..." (Jackson, 1993). Another book, *Deadly Consequences*, by Prothrow-Stith, M.D. (1991), found "...violence destroying our teenage population...." Even medical experts call for a more holistic, flexible, and tailored approach (*Educating Poor Minority Children*, James Comer, Ph.d, 1988). How many lives must be lost before you get involved and inject some sanity into the thinking in Austin? You must get busy now! Our kids are killing themselves and innocent bystanders, and terrorizing everyone in the process.

Arizona Prisoners Denied Adequate Mental Health Care

The treatment of seriously mentally ill prisoners in Arizona is "appalling," according to a recent decision today by United States District Judge Carl Muecke in Phoenix.

Ruling in *Casey v. Lewis*, a class action lawsuit brought on behalf of all Arizona prisoners, Muecke found that numerous deficiencies in the prison mental health system "result in deliberate indifference to inmates' serious mental health needs such that the inmates' constitutional rights to be free from cruel and unusual punishment are violated." Attorneys from the National Prison Project of the American Civil Liberties Union in Washington, D.C. and attorneys with the Arizona Civil Liberties Union brought the case for the prisoners.

Muecke rejected the prison officials' defense that these deficiencies are an unavoidable result of budgetary constraints. "The fact that the lack of staff and programming is partially a result of lack of funding from the legislature is not a defense to these constitutional violations," he wrote.

Arizona prison officials also discriminate unlawfully against female prisoners by failing to provide them mental health services comparable to those provided to men, Muecke found.

Muecke also found that the prison medical and dental care systems were unconstitutional at the time the lawsuit was filed. However, he found, the filing of the lawsuit caused prison officials to make numerous improvements, so that conditions were constitutional by the time of the trial. But, noting that "this Court cannot be assured that defendants will continue to implement the new programs," Muecke ordered prison officials to submit periodic reports on the status of the medical and dental care systems.

"It's a victory for basic human decency," said Stuart H. Adams, Jr., a lawyer for the National Prison Project. "A sentence to prison should not be a sentence to death or needless suffering because of a lack of medical or mental health care."

In a 186-page opinion, Muecke found that prison officials fail to provide sufficient mental health staff, provide inadequate mental health programming, and inappropriately use lockdown as a substitute for mental health treatment. He also found that prisoners with serious mental health needs experience unacceptable delays in assessments and treatment.

Muecke ordered the lawyers for both sides to meet and draft a proposed plan to remedy these deficiencies. The plan is to be filed with the Court by September 30, 1993.

The Transsexual In Prison - A Focal Point

By Lofofora Eva Contreras

[***Editors Note:*** *Quetzala Lofofora Eva Contreras is a First Nations Transsexual Lesbian. She is a trained paralegal and from 1990-1992 was the Executive Director in California of Transsexuals In Prison, a nationwide organization of incarcerated and non-incarcerated, pre-and post-operative male to female and female to male transsexuals and their supporters working for improved medical and custodial conditions of the imprisoned transsexual, and editor of its California region newsletter* ***Pan-Transsexual Awareness****. She is a past member of Fact Quebec, which centers on AIDS and other issue facing Transsexual, Lesbians and Gays in Canada. Born into the Cupeno Nation, Lofofora is a council member of Ce Anahuatz Wakana (Generally, First Nation Transsexuals), a religious society of native transsexual lesbians.*]

Gender dysphoria is generally defined as a serious psychosexual disturbance. Briefly, gender dysphoria is a condition that involves sex-role inversion and hormonal and surgical sexual transformation. Sex-role inversion is a condition in which a person of one biological sex thinks, feels and acts like the opposite sex, the acquisition of a sex role not consistant with their biological composition. Its cause remains unknown. Some researchers place predisposition *in utero*. Transsexualism is the most radical form of gender dysphoria. It is a serious medical condition.

The late doctor Harry Benjamin pioneered the study and treatment of Gender Dysphoria with a focus on transsexualism. The Harry Benjamin International Gender Dysphoria Association Inc., is an international association of gender professionals. It has established the *Standards of Care*, an international "minimum" guideline for professional treatment of gender dysphoria. Professional credibility in treatment of gender dysphoria is measured by adherence to the minimum *Standards of Care.*

The diagnostic criteria for transsexualism is listed in the *Diagnostic and Statistical Manual of Mental Disorders*, 3rd ed.-revised (DSM-111-B), published by the American Psychiatric Association, Washington, D.C. (1987), pgs. 71-78.

Management of the condition is by means of certain exceptional therapies including behavioral accommdation therapies, endocrinological interventions, pharmo-psycho therapies and surgical procedures. The proponents of treating or "curing" transsexuallism through adverse psychotherapy in an attempt to have the transsexual adopt the sex-role of their birth sex, espouse a proposition that has been proven highly unsuccessful. (See, e.g., *G.B. v Lackner*, 80 cal App. 3d, 64,68-69; 145 Cal Rptr. 555 (1978.)

Because transsexulism is a serious medical condition it falls within eighth amendment analysis when a transsexual becomes incarcerated. Under the eighth amendment of the U.S. constitution prisoners have a right to be free from cruel and unusual punishment. (See also, California Constitution, Article I. Section 17.) "Deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton inflection of pain... proscribed by the eighth amendent." (*Estelle v. Gamble*, 429 U.S. 97, 105-106 (1976)).

The right of incarcerated transsexuals to treatment of transsexualism is now recognized to some degree by the courts, and failure of prison officials to provide some form of treatment constitutes deliberate indifference to a serious medical need. (*Meriwether v Faulkner*, 821 F.2d 408 (CA7 1987), cert. denied, 108 S. Ct. 311 (1987), (transsexuals entitled to some form of treatment)). *Farmer v Haas*, 90-1008 (CA7 1991) (unpublished order not to be cited per circuit rule 53)(reversing summary judgment for defendants in *Bivens* action for damages for failure to treat transsexualism in prison.) "District court erred in granting summary judgment to defendants. The documentation submitted by Farmer supports her positon that, despite requests, she was denied any and all forms of treatment for her transsexualism in violaton of the eighth amendment. Farmer has proven facts sufficient to show that all named defendants were personally involved in the deprivation. In light of the record before this court, we must conclude that the district court could not, as a matter of law, grant summary judgment to the defendants.") Yet prison officials continue to violate transsexuals' constitutional rights by showing deliberate indifference to their condition, triggering civil rights lawsuits for injunctions or damages and petitions for a writ of *Habeas Corpus*. Less formal, transsexuals in prison have taken to self-mutilation, autocastration and suicide attempts for lack of treatment.

No case of deliberate indifference to serious medical needs in a penal setting in 20th century U.S.A. is more dramatically illustrated than that of the incarcerated transsexual. The case of transsexual Shauna Supre provides a shocking awakening to the consequences of prison officials' deliberate indifference to transsexualism in penal institutions and of the severity of the transsexual's dilemma.

Ms. Supre was committed to the Colorado Dept. of Corrections to serve sentences for auto theft and escape. Described as "exceedingly effiminate" in later court documents she was initially housed in the general male inmate population. There she was repeatedly raped and beaten. For safety reasons she was finally placed in 23-hour a day protective lockup. During the course of her incarceration she made administrative attempts for treatment in the form of estrogen therapy, all to no avail. Finally, in desperation, she tried to castrate herself: "...He(sic) (plaintiff) attempted to arrange(female) hormone treatment which apparently was not given for reason of policy... He made at least one attempt to kill himself by hanging... on the 29th of June (1981) he incised and removed a portion of his scrotum, placing string and rubberbands about the spermadic cords bilaterally and this was found the next day and the constricting bands removed and he was sent to the surgical services at Colorado with the problem... He was seen by myself Dr. Fogel. The wound was as described- completely bare testi-

Continued on next page...

cles obviously contaminated and beginning to be infected, an absent portion of the scrotum... He was very clear in his statement that he had only the loss of his testicles in mind and that he was purposefully forcing the issue and he was quite apologetic for putting me in this position, but he felt he must and that he would not allow any treatment unless it was made clear that he would have his testicles removed. Consultation with (various doctors, Ms. Supres' Attorney, the Deputy Attorney General) has made me reach the conclusion, with a good deal of thought and some difficulty, that the patient, at this point, should have his testicles removed. This is based on the fact that he is not in anyone's opinion insane; that he is absolutely determined to have this done and from the psychiatrist's evaluation, in two instances, that he is a true transsexual who is so determined that he has made intelligent efforts to lose his male gonads..." On July 2, 1981, the plaintiff's testicles were surgically removed at the Colorado State Hospital..." (See *Supre vs.Rickettes*, 596 F.Supp. 1532, 1533-34 (1984).

Social bias and misconceptions contribute to the peoblem. Transsexuals are rountinely catagorized as"homosexual" upon incarceration. Homosexuality is not diagnosed as a medical dilemma and no treatment is given for it. Although homosexuality is often a component of sex-role inversion, inversion is not a component of homosexuality. In the instances where transsexuals in prison are acknowledged different beyond the homosexual label-due to their highly effiminate nature, basic female psychological composition, silicone or hormone induced breasts- they are sometimes segregated from general inmate populations for protection from sexual assaults and harassment. Yet they are not offered or given any treatment for their condition, even when it is asked for. Some jails and prisons have a practice of providing hormonal treatment to transsexuals who have documented proof of treatment prior to incarceration. But this practice is the exception, not the rule. It is a serious fault. It is not common for incarcerated transsexuals, who are usually from the lower echelons of the socio-economic order, to have such documents. For those who do not meet this criteria, or where such criteria does not exist, as far as the prison or jail is concerned they are not entitled to treatment. Similarly, a person who experiences a transsexual metamorphosis while incarcerated and embodies all the diagnostic criteria is denied a diagnoses or any form of treatment simpy because they had never been treated for the condition prior to incarceration.

Prisons must provide doctors competent in diagnosis of gender identity problems and treatment techniques prescribed in the *Standards of Care*. Where provided, they must adhere to the principles of the *Standard of Care* and not to the whims of prison officials. Legislation outlawing discrimination against persons must include "gender dysphoric", "gender orientation" or "transgender." Although Gay Rights bills are a move in the right direction, they are not inclusive of transsexuals in their scope. Transsexuals are not "gays." The *raison d'etre* of gays and lesbians is in their sexual orientation, whereas the *raison d'etre* of transsexuals is in their gender orientation.

The guidelines of the *Standards of Care* and the diagnostic criteria of the DSM-111-R must be imposed upon the prisons, courts and legislatures because they are officially sanctioned by established, identifiable professional groups.

(Note: Anyone interested in Transsexualism from a legal-technical point may request a copy of the *Standards of Care* from the Harry Benjamin International Gender Dysphoria Association,Inc., 1515 El Camino Real, Palo Alto, Calif. 94306. Specify your interest and work in the field. Prsisoner litagators aware of transsexuals desirous of treatment (Hormone Therapy, E.G.) are encouraged to assist them in becoming aware of their rights. For more info on the Medical-Legal aspects of Transsexualism or to learn more of Tip contact: Madammoiselle Patricia Fisher/ c.p. 2931 succ. Cote-des-Neiges Blvd./ Montreal, Quebec, Canada H3S 2S6.)

Incompetent Medical Exam Violates 8th Amendment

Eugene Souza was a Rhode Island state prisoner. He developed acute appendicitis and sought treatment from prison doctors. The prison did not provide direct access to doctors; instead, sick prisoners were screened by a guard/nurse who would schedule doctor visits if they felt it was necessary. For a three month period Souza suffered pain and infection before he was seen by a doctor. Souza died of appendicitis shortly thereafter due to a lack of treatment and his estate filed suit.

In this case the defendants have filed 14 motions to dismiss. Each time the court has denied their motions and does so again. The court noted that the eighth amendment standards of deliberate indifference to medical needs are complicated when a prisoner receives some treatment and claims it is inadequate. The court held that inadequate treatment can be tantamount to denial of treatment and is thus actionable under § 1983 and the eighth amendment.

The court denied the defendants' qualified immunity by ruling it was a material fact in dispute, because determination of the defendants' mental state is best done by a jury.

A grossly incompetent and recklessly inadequate examination by a licensed physician is a deliberately indifferent examination. The court notes that to argue that this type of conduct by doctors is constitutional "is like insisting the fabled unicorn and martians actually exist."

The nurse who refused to let Souza see a doctor for three months was not immune from suit because she acted in a quasi-diagnostic role sufficient to show deliberate indifference. The court dismissed one defendant from the suit citing his lack of personal involvement in Souza's death. See: *Rosen v. Chang*, 811 F. Supp 754 (DC RI 1993).

Informal Brief Acts as Notice of Appeal

William Smith is a paraplegic Maryland state prisoner. He filed suit against various prison guards, doctors and officials claiming they were deliberately indifferent to his serious medical needs by denying him use of a wheelchair.

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Before trial the district court dismissed several of the defendants. The case went to trial and a jury ruled against two of the prison psychologists and awarded Smith $15,000.00 in damages. The court directed verdicts in favor of nine other defendants. Smith then filed an informal brief in the fourth circuit court of appeals requesting "a new trial on all issues triable by jury."

The appeals court had previously ruled that Smith's informal brief was not a notice of appeal sufficient to constitute notice under Federal Rule of Appellate Procedure (FRAP) 3(c). The US Supreme Court disagreed and held that "if a document filed within the time specified by Rule 4 [of the FRAP] gives the notice required by FRAP 3, it is effective as a notice of appeal." *Smith v. Barry*, 112 S.Ct. 678, 682 (1992). The case was remanded back to the court of appeals for further proceedings.

On remand the court held that Smith's informal brief contained the functional equivalent of the specifications required by FRAP 3(c). Thus, Smith could proceed with his appeal. Ruling on the merits the appellate court affirmed the directed verdict in favor of the defendants. The court held that informal brief was not sufficient notice of appeal for one of the dismissed defendants and dismissed that portion of the appeal. See: *Smith v. Barry*, 985 F.2d 180 (4th Cir. 1993).

Confiscation of Legal Materials States Claim

Wayne Zilich is a Pennsylvania state prisoner. When he was transferred from prison to a county jail for court proceedings jail guards confiscated a number of his transcripts, legal materials and papers and refused to return them. Zilich filed suit under § 1983 claiming that the confiscation of his legal materials violated his right of access to the courts. The district court dismissed the complaint for failing to state a claim for which relief could be granted. The district court held that because Zilich could file suit in state court he had an adequate post deprivation remedy which barred a federal § 1983 action.

The court of appeals for the third circuit reversed and remanded. The court begins by noting that access to the court claims can be filed under § 1983. Because the destruction or confiscation of legal materials may violate the right of access to the courts the lower court erred in dismissing Zilich's suit.

The court went on to hold that the existence of state post deprivation remedies did not foreclose a § 1983 claim in federal court. The court held that *Hudson v. Palmer*, 468 US 517, 104 S.Ct. 3194 (1984), does not apply to this type of case. "*Hudson*, however, concerned only the deprivation of property by prison officials and, by its own terms, is limited to the procedural due process context. Where, as in the case at hand, a prisoner's complaint alleges the taking of *legal* property that results in the denial of his access to the courts, the *Parratt/Hudson* analysis cannot, and does not, apply." See: *Zilich v. Lucht, 981 F.2d 694 (3rd Cir. 1992).*

AG Not Entitled to Immunity

Alvin Canell is an Oregon state prisoner. While in prison he filed several § 1983 suits which were successful and received several thousand dollars in settlements from the Oregon DOC which were then held in trust by his lawyer. Jan Londahl is the Oregon Assistant Attorney General (AAG) who represented the DOC officials in these suits. Canell owed the DOC about $2,000 in photocopying, postage and similar costs from his litigation. Shortly before his release Londahl contacted David Hicks, an AAG with the AG's bankruptcy section, and suggested that Canell be sued to recover the money owed the DOC. Hicks sued Canell but eventually dismissed the litigation as not being cost effective due to Canell's contesting the suit.

Canell then filed suit against Hicks and Londahl under § 1983 claiming they had violated his right of access to the courts by suing him for his settlement money. The defendants sought summary judgement claiming they were absolutely immune from suit because of their status as AAGs. The court rejects their argument and denied their motion.

The court gives an extensive and detailed discussion of the doctrines of absolute immunity. It holds that government attorneys who initiate civil proceedings are not entitled to absolute immunity. Only where the underlying action is related to a criminal prosecution does the government attorney enjoy absolute immunity. Because the DOC was acting as a common creditor seeking to collect a debt, they were acting as ordinary litigants, not as "the state."

The court went on to hold that even if the government attorneys were absolutely immune from suit, that defense would not be available in this case. The court ruled that to grant absolute immunity to government officials who retaliate against successful § 1983 litigants would violate long standing constitutional principles. It also denied the defendants' qualified immunity on this same basis, noting it is well established law that state officials cannot retaliate against prisoner litigants. See: *Canell v. Oregon Department of Justice*, 811 F. Supp 546 (DC OR 1993).

Congress to Limit Prisoner Suits

A comprehensive civil justice reform bill has been introduced in the Senate by Charles Grassley (R-IA). S.585, the Civil Justice Reform Act of 1993, would establish a modified English rule on attorney fees in federal diversity cases. The amount the loser would have to pay would be limited to the amount of his or her own fees, and the court would be given broad discretion to limit the amount to prevent injustice. The bill would also require 30 days advance notice of intent to sue. Prisoners with civil rights cases would be required to first exhaust their administrative remedies before filing suit in federal court.

The bill would also establish a statutory offer of judgement rule, pursuant to which either party could offer a settlement to another party at any point in the litigation. Finally, the bill would limit the parties to one expert witness on a given issue. *1993 WL 73183 (pp. 8-18).*

Rehabilitation versus Punishment = Attitude

By John Adams # 287645

I'm a prisoner at the Washington State Penitentiary (WSP) in Walla Walla, Washington. I'm one of the Indeterminate Sentence Prisoners who the Parole Board has to determine is "rehabilitated" before they will release me back into society. While I have to be rehabilitated to secure my release, prisoners sentenced under Washington's Sentencing Reform Act (SRA) are merely being "punished" (the Parole Board has no authority over them) and rehabilitation is not a prerequisite before they are released back into society.

I understand that several states have similar sentencing systems as the State of Washington-- the system will be explained in more detail below. What is the equation Rehabilitation versus Punishment = Attitude?

The Revised Code of Washington (RCW) provides that the Parole Board shall not release a prisoner unless in its opinion his "rehabilitation" has been complete and he is a fit subject for release. RCW 9.95.100. To my knowledge, the Washington State Parole Board has never defined the meaning of the word rehabilitation to the prisoners under its control. Old guideline prisoners, the only ones who must be rehabilitated, are treated no differently than SRA offenders who are merely being punished. What follows is a recent history of the law of rehabilitation as it has unfolded in Washington State.

In today's society, there is a so-called 'war on drugs' and the prison population throughout the nation's prison system has skyrocketed for drug related offenses. Prisoners in Washington who committed drug-related offenses prior to July 1, 1975, had a statutory right, created through RCW 69.32.090, to be rehabilitated through treatment programs within the prisons. That statute was repealed during the 1975 legislative session. See *State v. Barnett*, 17 Wn.App. 53, 55 (1977). This is only one example of the "rehabilitation" programs taken by law in the State of Washington.

In 1977, the Washington Supreme Court held in *Bresolin v. Morris*, 88 Wn.2d 167, that *rehabilitation of convicted persons is a legitimate governmental interest and institutional goal*, but is not an enforceable right of instutitionalized persons. The Washington court reasoned that "the legislature in this state also adopted rehabilitation as a penal goal" through RCW 72.08.101. The court went on to say that the concept of rehabilitation as a practical goal of confinement is under question. *Id.* at 173.

The statute, RCW 72.08.101, that gave the state the penal goal of rehabilitation was amended in 1979. In 1981 the SRA was adopted. The intent of the 1981 SRA did not mention rehabilitation, but stressed that the "system should punish the offender for violating the laws." RCW 72.09.010.

In 1983, the Washington Supreme Court addressed the relevancy of rehabilitation. *State v. Phelan*, 100 Wn.2d 508. The court said: "The Board is as much concerned with 'just punishment,' 'deterrence,' and 'incapacitation' as with rehabilitation." *Id.* at 514.

The previous indeterminate sentencing system focused on rehabilitation by basing sentences on the individual's characteristics, rather than the nature of the crime and attempting to predict future behavior to coerce offenders into reforming. Under the SRA, punishment is the paramount purpose. *State v. Rice*, 98 Wn2d 384, 393, 655 P.2d 1145 (1982). Rehabilitation is irrelevant because it cannot change the length of the sentence. Thus, it is relegated to a minor role and *comes into play only at the initiation of the offender.* That brings us to the answer to the equation: Rehabilitation v. Punishment = Attitude.

The attitude among the majority of prisoners throughout the nation's prison system is "who needs an education or vocation skills? I was sentenced to prison to be punished!" This negative attitude is facilitated by the indifference of the system and by prison officials.

Every prisoner needs an education and/or vocational training. If we had an education and job skills in the first place, most of us wouldn't be in prison.

While nobody has tried to define rehabilitation to prisoners, the Washington State Legislature has declared it to be vocational and education programs within the institutions. RCW 72.62.010. Regardless of the definition of the law that a prisoner is sentenced under (rehabilitation v. punishment), the nation's prison system should not change its purpose of rehabilitation. The inmates who avail themselves of programs during their incarceration, to accomplish their rehabilitation, present the least risk of recidivism. Most institutions offer the inmate the opportunity to educate himself/herself or vocational trades programs. At WSP there are numerous educational and vocational programs from which inmates have obtained certificates of completion and associate degrees. For example, in 1992, the Walla Walla Community College, cited at WSP, graduated a goodly number of inmates with degrees and/or certificates in the following areas: 52 GEDs; 3 High School; 1 Carpentry Certificate; 1 Upholstery Certificate; 3 Barbering Certificates; 1 Bookkeeping Certificate; 34 Basis Custodial Services Certificates; 19 Advanced Custodial Services Certificates; 1 Computer Application Specialist Certificate; 2 AAAS Carpentry Degrees; 2 AAAS Engineering Degrees; and 11 AA Degrees.

It is your responsibility as a prisoner to break the stereotype attitude of the garden variety prisoner and make better use of your time than most people in society by taking advantage of the educational and vocational programs your facility has to offer. If your facility doesn't have sufficient opportunities to rehabilitate yourself, the person who can take steps to change that is the person who looks at himself in the mirror in the morning.

The bottom line is an education and/or job skills are essential for prisoners to successfully reintegrate back into society and law makers, prison officials, and prisoners should all work toward that goal.

Illinois Tolling Statute Unconstitutional

Until 1987 Illinois prisoners had until two years after they were released from prison in which to file lawsuits. Any statute of limitations was tolled by imprisonment. In 1987 the Illinois legislature modified Illinois Rev. Statute ch. 110, ¶ 13-211, so that claims by prisoners against the DOC or DOC employees were not tolled by imprisonment. Thus creating a special tolling exception for the DOC.

Anthony Dixon was infracted for killing a guard, found guilty at a disciplinary hearing and given a year in segregation and lost a year of good time. He attempted to file suit in 1987 but did not actually file until 1991. The district court dismissed the suit holding it was time barred by the tolling statute. Dixon appealed contending the tolling statute was unconstitutional.

The court of appeals for the seventh circuit reversed and remanded. The court relied on *Felder v. Casey*, 487 US 131, 108 S.Ct. 2302 (1987), in determining that the Illinois statute was "inconsistent with the constitution and laws of the United States." Because the Illinois legislature singled out claims against certain public employees (prison officials), and made suits against them more difficult, it unlawfully burdened the exercise of federal § 1983 suits. While a state can choose not to confer a tolling benefit at all, it can't confer it selectively and withhold it regarding claims against certain government officials. Citing *Felder*, the court gave a history of the purpose of § 1983 suits which seek to give a remedy to abuses by government officials. Given the special nature of § 1983 actions, the states can't pass laws designed to undercut a federal remedy imposed by the US congress. See: *Dixon v. Chrans*, 986 F.2d 201 (7th Cir. 1993).

Grievance Procedure Tolls Statute of Limitations

William Gartrell is a Texas state prisoner. He filed suit under § 1983 claiming prison officials conspired to file trumped up disciplinary charges against him in retaliation for his legal activities; the disciplinary hearing and grievance procedure did not comport with due process; and that he was denied an impartial review of the disciplinary and grievance proceedings.

The district court dismissed Gartrell's suit under 28 U.S.C. § 1915 (d) as being "frivolous" because the two year statute of limitations had run on most of the claims. The one claim that was not time barred, the denial of Gartrell's final administrative appeal, did not have a legal or factual basis as a constitutional claim.

The court of appeals for the fifth circuit concluded that the district court had abused its discretion and vacated and remanded.

The appeals court begins by noting that there is no federal statute of limitations for § 1983 civil rights actions. The federal court borrows the forum states general personal injury limitations period, which in Texas is two years.

Gartrell does not dispute the two year limitations period. Rather, he argues that the statute of limitations is tolled while he exhausts his administrative remedies. The appeals court agreed.

By noting that while § 1983 doesn't require the exhaustion of state administrative remedies it points out that congress has carved out a specific, limited exhaustion requirement for adult prisoners by enacting 42 U.S.C. § 1997, the Civil Rights of Institutionalized Persons Act. Under § 1997 district courts have the discretion of requiring prisoners to exhaust prison grievance procedures before their cases can be heard in federal court. Failure to exhaust those procedures can result in dismissal of the complaint. The grievance procedure at the Gatesville prison, where Gartrell is confined, is certified by the district court. Thus, the district court has the discretion to require that prisoners exhaust prison grievance procedures before filing suit.

Based on this, the appeals court held Gartrell had a colorable claim that the limitations period was tolled until he exhausted his administrative remedies. Thus, the district court had abused its discretion in dismissing the suit.

The appeals court also ruled Gartrell had stated a claim by alleging denial of an impartial review by prison officials of the disciplinary proceedings. The court recommended appointment of counsel to assist Gartrell. See: *Gartrell v. Gaylor*, 981 F.2d 254 (5th Cir. 1993).

Dismissal not Appropriate for Unintentional Delay

David Sterling is a BOP prisoner. He filed suit under the Federal Tort Claims Act (FTCA) in district court in California claiming prison officials at Leavenworth, Kansas, negligently prescribed medication which caused him severe stomach and auditory pain. After he filed suit he was moved to a North Dakota prison. He wrote the court clerk in California and requested that the suit be transferred to the district court in North Dakota. The suit was transferred and the district court dismissed the suit for lack of prosecution.

The court of appeals for the eighth circuit reversed and remanded. The appeals court noted that district courts have inherent power to dismiss cases for failure to prosecute and those dismissals are reviewed for an abuse of discretion. Cases should be dismissed with prejudice only where the plaintiff has intentionally and willfully failed to prosecute his/her claim.

The court held that Sterling had provided enough evidence that he was not notified of the case's transfer to North Dakota to explain his failure to prosecute. The appeals court ruled that an evidentiary hearing was required by the lower court in order to determine the exact circumstances of Sterling's failure to contact the North Dakota clerks office. See: *Sterling v. United States*, 985 F.2d 411 (8th Cir. 1993).

Men In Prison: A Review

By Paul Wright

Generally, whenever we review publications in *PLN* we give you a brief synopsis of their highlights and ordering information. That is because as a newsletter we lack the space to do much more than this. Occasionally a publication will come along that has a lot of good information in and of itself that is worth sharing. This is one of them.

Men's Studies Review (*MSR*) is published by the Institute for the Study of Social Change at the University of California at Berkeley. *Men in Prison* is a special issue of their gender studies publication. It is readily apparent that with about 93% of the prison population being male that the criminal justice system has a disproportionate impact on men. *MSR* puts this in a good perspective beyond what we normally see about the class and racial bias of the prison system. The following are excerpts from "Understanding Men in Prison:The Relevance of Gender Studies", an article by Donald Sabo and Willie London.

"The growth of the prison system can be explained with reference to gender order and masculine hegemony.

"(1) Social inequalities, especially highly visible ones, create social turbulence or low level revolt that then becomes policed. More extensive forms of revolt need to be put down by military force but this can undermine the legitimacy of the ruling groups. Criminal activity, in contrast, is not apt to be perceived by the masses as a result or reflection of social inequality or crises within the state. Hence, low level criminal revolt is seen as a 'law and order' issue and/or a police problem rather than an outgrowth of social breakdown or tension-producing inequalities. Both the existence of social inequalities and the false perception of crime mainly as a police matter, therefore, tend to escalate the rate of crime and imprisonment.

"(2) The prison system is apt to flourish in societies with a history of violence as a means of resolving public issues and private disputes. Violent interventions create lots of occasions for arrest and imprisonment as well as legitimating state violence in the form of imprisonment.

"(3) When poor and working class men are denied access to economic or cultural resources, they may develop forms of a 'contest' masculinity as a variant of hegemonic masculinity. These alternative or contest masculinities may embrace, valorize, and/or rationalize violent or criminal activity. Hence, it is no accident that the cult of violence and toughness that characterizes underclass or working class gangs appears to be a version of the 'kick ass' mentality of the American military and government elite during the Persian Gulf war. ...the 'subculture of violence' that permeates the cultural practices of delinquent male gangs, could also be read as a deviant variation of the hegemonically masculine values and practices of higher status male groups such as the police, the military, and some government officials.

"(4) The prison system is apt to expand when the gender, class or race history of a nation is in a state of blocked contradictions; that is, where tension and violence are being constantly produced but the authorities cannot afford to solve the problems that cause the tension and violence because, to do so, would challenge the legitimacy of the system itself."

In discussing prison violence and the reproduction of gender relations, which includes homosexual rape, hierarchies, etc. the authors comment:

"At any given historical moment, there are competing masculinities, some hegemonic, some resistant, some marginalized and some stigmatized. The prevailing cultural definition of masculinity within a political and economic social system is constructed in relation to various subordinated masculinities as well as in relation to feminities. ...the gender order possesses two main structural aspects. First, it is an hierarchal system in which men dominate women in crude and debased, slick and subtle ways. Secondly, there also exists a system of intermale dominance, in which a minority of men dominates the masses of men. This intermale dominance hierarchy exploits the majority of those it beckons to climb its heights.

"Male violence inside and outside prisons is, in part, impelled by gender, class and racial inequalities. Within the larger gender order, the violence associated with the 'war on crime' can be seen not only as a form of class warfare but also a struggle between dominant and marginalized factions of men.

"...middle-class and working-class men (and women) are positioned between the male elites who continue to wage a punitive 'war' on crime while refusing to alter the social conditions that create much crime, and a growing class of street criminals and white collar criminals who basically regard the middle- and working class as prey.

"The structural bases of male violence also find expression and extension within the prison itself. Prisons are filled with violent men. The threat and practice of physical or sexual assault are used by inmates to maintain the jailhouse pecking order. Guards rule through the threat and application of force, batons in hand and more lethal weapons at hand. For many prisoners, violent crimes led to incarceration. Others became violent, or at least act as though they are violent, only after being jailed.

"It would be a mistake, however, to perceive prison rape mainly as a power dynamic of intermale dominance hierarchies. Men's struggles to weave webs of domination through rape *in prison* also reflect and reproduce men's domination of women in the heterosexual world beyond the walls. In the muscled, violent, tattooed world of prison rape, woman is symbolically ever present. The prison phrase 'make a woman out of you' means that you will be raped. Rape based relationships between prisoners are often described as relations between 'men' and 'women' are, in effect, conceptualized as 'master' and 'slave'.

"The failure to recognize man on man rape can be interpreted as a 'socially structured silence' which, in effect, reconstitutes gender inequality by allowing homosexual

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rape to remain defined as a sexual phenomenon rather than an act of personal and political domination."

This issue contains numerous articles by and about men in prison written by researchers and prisoners themselves. Its well worth reading. Cost is $3.50 for this issue. Specify that you want Volume 9, Number 1 of *Mens Studies Review*. Write: Mens Studies Review, C/O Institute for Social Change, University of California at Berkeley, Berkeley, CA. 94720.

The Hot House; Life Inside Leavenworth Prison A Book Review

By Ed Mead

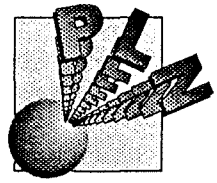
I have just finished a pretty good book. A comrade gave it to me late yesterday afternoon. I went back to my cell and started reading it, and then kept on reading until exhaustion overtook me at 3:00 in the morning. I woke up four hours later, at 7:00 a.m., ate a quick breakfast, and continued to read until finishing the book at 11:00 a.m. It is titled *The Hot House; Life Inside Leavenworth Prison*, by Pete Earley. The book is about the federal prison at Leavenworth, Kansas, during the two year period between 1987 and 1989, and it consists of a series of interviews with prisoners, guards, and prison administrators. The author is white, and it appears as if all the prisoners he interviews are also white and either members of or else sympathetic to racist gangs. Needless to say, the plight of black prisoners is not explored. Still, the writer does manage to communicate the terrible reality of life inside a maximum security prison. At least he succeeds in understanding that in an irrational world, such as a prison, irrationality makes perfect sense.

So I'm reading this book up until the wee hours of the morning, then finally drop off to sleep. The next thing I'm conscious of is the guards loudly laughing and carrying on down at the lock box. I am disoriented, though. I slowly become aware of the fact that I am in a cell at Leavenworth (where I've done time before) and that these pigs are disrespecting me by making all this noise. Anger rushes through me and I am ready to yell out some obscenity at them when a shadow of doubt suddenly crossed my mind. "Maybe I'm not at Leavenworth," I wonder, and just as that implausible thought is in the process of being dismissed reality makes its welcomed appearance. As my eyes open I see that I am indeed here in Monroe, and for some reason I feel better. I lay there for several minutes, then gout out of bed and got ready for breakfast. Strange, I said to myself, dreaming I'm in yet another prison.... The book was vivid enough to cause me to lose touch with the reality of my location as I slept.

The author's racial blinders is an important point to note because he uncritically discusses how well the prison administration is able to manipulate prisoners on the basis of this weakness. When trying to divide the American from the more militant Cuban convicts ("disruptive" might be a better word, as the Cubans holding Atlanta prison gave up Tom Silverstein to the feds as a show of their good faith). Earley quotes Leavenworth's Associate Warden Smith as saying: "We told the American convicts that they were getting the best cellhouse in the prison. We also told them that we had planned to do a real thorough shakedown for weapons and other contraband but because of the Cuban riots we needed their cooperation." Smith offered the prisoners a deal. "If they were willing to move from C and D cellhouses [*where rioting Cuban detainees were to be moved*] without causing any problems, then we were willing to ease up on the shakedown." The move took place without incident. When the Cuban prisoners did create a disturbance the warden got together with his associates. "We don't want to take any privileges away from the American convicts or get them upset," the warden said. "We don't want to be fighting both groups at the same time."

When a team of Bureau of Prisons investigators subsequently came in to inquire into allegations (made by a staff member) of guard brutality against Cuban prisoners, they concluded that the allegations of brutality could not be substantiated. The author just happens to note in passing that the investigators had never spoken to a single cuban prisoner. Hence, even though the author does not appear to be conscious of this underlying dynamic, it is clear that this most disruptive element of the population was allowed to be brutally treated, and that the administration was able to accomplish this by successfully exploiting the narrow self-interest and racism of American convicts.

Anyway, if you want a good read despite the book's political weaknesses, then I would recommend you check this one out. It is *The Hot House; Life Inside Leavenworth Prison*, by Pete Earley, published by Bantam Books, 1992. Incidently, for the sake of historical accuracy, Leavenworth prison has historically been called "The Big House," not The Hot House. It was the Big House back in gangster days and before. Old time gangsters were sent to the Big House where they walked the Big Yard and planned their next job with their criminal cronies.



Prison Riot in Argentina

One prisoner was killed and several were injured by gunfire and several others managed to escape from Batan prison outside Mar de Plata, Argentina, when a riot erupted after a Feb. 8, 1993, break out attempt. According to differing reports, either 23 or 18 of the 25 prisoners who tried to flee were subsequently recaptured; another 80 who had remained inside the prison and had taken two hostages surrendered on Feb. 9. The prison holds about 700 prisoners total. In Coronda, another Argentine prison in the province of Santa Fe (north of Buenos Aires), some 70 prisoners started a protest on Feb. 9, after authorities discovered a tunnel more than 50 meters long.

Source: *Weekly News Update.*

Editorial Comments

By Ed Mead

Paul and I have been doing the newsletter with this new 16-paged magazine format for several months now, and in that time we have managed to get a sense of what difference in cost this new printing system will make. By dividing our production cost into the number of *PLN* readers we have come up with a figure of nearly 75¢ to produce and mail each copy of the newsletter to you. This amount does not include *PLN*-related postage, phone calls to our volunteers, photocopying, and the many other costs related to running the day-to-day operation of the paper. Anyway, this 75¢ is about 25¢ more than the approximately 50¢ it cost when we were putting out only ten pages a month. So our productions costs have risen by a quarter per issue, and for that 25¢ we are able to give you six more pages of newsletter each month.

Since our cost of production has gone up, we are going to pass this extra expense on to you in the form of higher subscription rates. From now on, when you send in a contribution it will buy you fewer months worth of newsletter. Up until now we have been charging readers only 50¢ per month, the actual cost of production of producing and mailing ten photocopied pages. From now on, however, the money we receive will be broken down into 75¢ increments, with the subscriber getting a month for each one of them. This amount will pay the 75¢ it costs us to make and mail the 16 pages of paper to you, as well as to help offset some of our ancillary costs. And this 75¢ amount will be especially important to cover the added expense of subscriptions for the 38 percent of our readers who are getting the newsletter for free. These are prisoners on death row, in control units, or else located in some of the Southern states where money is next to impossible to earn.

In addition to raising our annual suggested subscription price from $10 to $12, we will also be raising our institutional subscription rate from $25 to $35 per year. For prisoners and low income people, these rates are of course flexible. As always, if you send us what you can you will get the paper (we mail more than 38 percent out for free already). Just remember that Paul and I are prisoners, and any shortfall in income must be made up from our own pockets (we each earn a maximum of 38¢ an hour at our prison jobs).

It is our fond hope that the above cost increases will only be temporary, lasting only as long as it takes to settle into the implementation of this new and larger printing format. It will be tough going for us at first. Paul calls it a "Great Leap" forward. I think of it more as a "Great Plunge" (because I'm not sure where we'll land). I worry about these first six or eight months of the new system. While it will be hard for awhile, the beauty of this way of doing the paper is that, as the number of readers increases, our production cost per newsletter decreases. In other words, the more readers we have the less it costs per paper to get the printing done. There is a point at which we will paying less for 16 printed pages than we were for 10 photocopied pages. That's the point we want to reach.

The first thousand copies costs a lot, but each additional thousand costs much less. Accordingly, we need to significantly increase our paying subscriber base, and to accomplish this we need your help. We need each of you to take personal responsibility for getting others at your facility, or friends and family members on the outside, to subscribe to *PLN*. For readers on the streets, we need you to get others who may be interested in reading *PLN* added on to our mailing list. If you take on this task we can get our subscription costs back down to where we like them to be--we can provide more people with better newsletters for less cost.

If each reader gets only one new paying subscriber we will be in good shape for the long haul. We won't be folding or anything like that even if we are unable to pull off this expansion effort. The worse case scenario is that we will go back to ten photocopied pages a month. It would be a retreat, but we would continue to be here for you as long as you continue to support us. Still, if you want to see us grow, we will need more paying readers. Help us out.

That about ends today's discussion. See you next month. Be sure to pass this on to a comrade when you are done reading it. And please, do work at getting us more paying readers so we can grow. I'll close this diatribe off with a little quote I read in the newspaper the other day. It seems that after years of noble service on state prison-related boards, Harry Whittington, chairman of the Texas Public Finance Authority, has finally come to this conclusion: "Prisons are to crime what greenhouses are to plants."

We Need Solutions, Not More Prisons

by Ed Mead

The state of Washington, like most other states in the U.S., is on an expensive prison building binge. The state's prison population has tripled since the late '70s, yet crime rates continue to soar. The same situation exists elsewhere across the country. Californians, for example, believe that the greater the number of cells, the safer they are. Since 1980, that state's prison population has grown 300 percent. Six percent of California's general fund is spent on corrections, up from 2 percent a decade ago. Yet FBI reports say violent crime in California jumped 4.3 percent last year.

The reasons for this are varied and complex, and beyond the scope of this article. It's enough to say that there is some evidence to suggest that imprisonment may actually increase post-release criminal activity. The December 1992 issue of *Corrections Today* reported on a recent study done by the RAND Corporation: "RAND analysts," the article said, "recently studied a 'matched sample' of California offenders convicted of similar crimes and with similar criminal records. The two groups differed only in their sentences - members of one group went to prison, the others received

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probation. After tracking the groups for three years, researchers found consistently higher re-arrest rates for offenders sentenced to prison. Drug offenders who had been incarcerated were 11 percent more likely than their probation counterparts to be criminally charged again, violent offenders were 3 percent more likely and property offenders 17 percent more likely."

A National Academy of Sciences panel recently concluded that drug clinics do more to rehabilitate drug addicts than prison, job training does more to reduce recidivism than incarceration, and early childhood prevention programs do more than any other factor to reduce a propensity to crime. Now, in the midst of a serious recession, when every additional corrections officer may mean one fewer teacher, and every prison cell constructed may mean a crime prevention program unfunded, public education is essential to meaningful change in our approach to the crime problem.

As things stand, the people who own the news media tell the public what to think about crime and how the problem is best dealt with. The news services "poll" citizens and discover that they believe just what they were told to think (that locking more people up for longer periods of time is the best solution). Bourgeois politicians, who pretend to be acting on behalf of the public's will, use the results of these so-called polls to justify the initiation of additional prison construction and ever more draconian crime bills.

The wait for the ruling class media or bourgeois politicians to correct this disservice to public safety will be a long and unproductive one. These are the very people who profit from the construction and maintenance of prisons. The task of public education must be taken up by the kind of people who read *PLN*. If the community's information needs are not being met by the media, as is the case with the current level of sensationalized crime reporting, then it is necessary for oppressed people themselves to fill the information vacuum.

Short term answers are so simple. We need jobs! Not alienating, low-paying, dead end work, but employment that will give us a sense of self-worth and meaning. Some years ago prisoners at this facility successfully concluded a 2½ year struggle to get personally owned computers into our cells. We had the machines for three years without a single computer-related infraction being issued. During this period many prisoners were able to train themselves in areas such as computer programming, spreadsheets, word processing, and database management. Best yet, since inmates bought the units themselves, they were able to accomplish all of this at no expense to tax payers. Today these men are working in the computer industry on the outside, paying taxes, supporting their families, and making a good living.

Then along came some reactionary prisoncrat who up and ended this productive and cost effective computer training program. He did this for no rational reason. That was over 4½ years ago, and today we may be on the verge of once again obtaining computers in our cells. This ongoing struggle to serve both public and prisoner interests has been long and bitter. The big shame of the matter is that the resistance to innovative programs like this comes from those officially charged with the responsibility of protecting the public.

The ill-advised suppression of successful programs such as the computers, and the official reliance on incarceration to solve the crime problem, will never change in the absence of a paradigm shift in the public's attitude toward criminal justice issues. Today they see punishment, pure and simple, as the best solution. It isn't that people are intrinsically vindictive or hateful. They simply don't want their VCRs stolen or their daughters raped. They are inculcated with bourgeois propaganda to the effect that the solution lies in ever increasing levels of repression (including the death penalty). The mental shift that must be made is from punishment outlook to more of a healing perspective.

Think of today's social order as a well worn suit of clothing that's already covered with patches. I for one believe this suit is worn beyond repair and needs to be completely replaced with a brand new suit. Yet most people aren't ready to toss out capitalism, as they see still more life in the system. They believe yet another patch will do the trick. So you have this worn out suit and you notice a new tear in the fabric. Think of this new tear as crime. After all, criminality is only another symptom of the weakness in the social fabric. So what do we do, get angry and tear open this rip even further? Of course not! Anyone with an ounce of sense recognizes such weakness and sews on a patch. Similarly, rather than ostracizing the individual criminal, he or she should be seen as an area of the social fabric in need of strengthening. This takes the form of special education and training. Most of us wouldn't be in prison if we had the skills to earn a decent living, we would not be raping our sisters if we had an anti-sexist consciousness that didn't view women as objects. But the prison does nothing to rectify either of these areas, or any others. It would cost the public less to send us to Harvard and make doctors of us than it would to keep us in prison. Yet the public's current level of understanding is still fixated on the counterproductive punishment mode.

"Why should I pay taxes to send a robber to college," asks the worker, "when I can't afford to give my own son a college education?" While this begs the question of why a free education is not available to everyone who wants one, it nonetheless represents a widespread sentiment. The simple answer is that the offender represents a weakness that needs to be strengthened. If the number of patches we had was limited, we wouldn't add one to a part of the suit that wasn't in some way damaged.

Capitalism cannot of course provide jobs for everyone, nor education, or housing, etc. For truly restorative justice to really work we will need a society based on something more substantial than the drive to make a profit. And that too is beyond the scope of this article. For now I merely want to get the point across that alternatives do exist, but before they can be implemented even on a limited scale, the public's attitude must be changed. This is not a job that should be left to the bourgeois media or politicians; their interests lie elsewhere. It is, rather, a task those most directly affected must undertake. Prisoners and family mem-

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bers need to highlight the failure of the existing criminal justice policies, and to inform the public about steps that can be taken toward a more restorative approach to the national crime problem.

This educational task should not be too difficult to perform. Conservative government statistics reflect a national recidivism rate of 62.5 percent within three years of release. The public pays between $20,000 and $40,000 a year per prisoner for this failure rate. Can you imagine a private industry surviving with a 63 percent failure or product rejection rate for each of the very expensive items it produces? Of course not! Instead of the biologists (or whatever) the public could be getting for less money, they get the enraged products of the state's dehumanization process. This rage then gets taken out on the community.

The interests of prisoners and those of poor and working class people are the same. There are legitimate alternatives that the public deserves to hear. Yet it will take some building with our loved ones on the outside before it will be possible to communicate these alternatives. We will also need to defend against efforts by the anti-democratic and pro-slavery forces to censor our modest message.

Prison Breakout in Peru

On March 27, 1993, some 70 prisoners from the Cuzco jail in the Southern Andes of Peru escaped after at least 20 presumed members of the Communist Party of Peru (PCP) destroyed a back wall by exploding a vehicle loaded with explosives, according to a journalistic source.

A journalist from Cuzco, 360 miles southeast of Lima, said that initially there were five reported dead, including one policeman, and most of the prisoners who escaped in the confusion were members of the PCP.

The report stated that during the moments following the sunday visit at the jail, the insurgents exploded a pickup truck loaded with approximately 100 kilograms of dynamite, followed immediately by strong gunfire.

From outside the jail, the guerrillas protected the exit of the prisoners by firing at guards. It is presumed that the prisoners also fired some weapons to open their way, said an informant. A Cuzco police chief, who asked not to be identified, said that there is evidence that the prisoners used vehicles and even horses to get away from the jail that was considered high security.

PLN has reported the barbaric conditions of Peruvian political prisoners and POWs [*PLN*, Vol. 4, no. 4] in the aftermath of the May, 1992, prison massacre in Canto Grande. After the massacre the Peruvian government has tried to weaken the prisoners' resistance by dispersing them in smaller groups to remote areas of the country. This government strategy obviously has its drawbacks. Once out of Lima, where the government is still comparatively strong, it is easier for the PCP to rescue its members. The greatest danger is that as the government finds itself weakened even further they may try to kill all the POW's in their custody.

German Prison Destroyed

Many people in Germany had good reason to celebrate in March. Early on Saturday, March 27, a series of explosions destroyed most of a newly completed high-tech prison that was to be put to use in May, 1993. The prison in Weiterstadt, close to Frankfurt, took eight years to build and cost 250 million Marks ($155 million). It was to hold 500 prisoners and was to be a multi-use prison, including units for deportees, a high-security unit for women, and for prisoners awaiting trial. The German state has made much of Weiterstadt's "humane conditions" - a model for a new corrections policy. The latter is true, Weiterstadt would have embodied the latest in high-tech incarceration. The prisoners were to be placed in so-called "living groups" of 10 to 20 prisoners, in single cells with a common room and a small kitchen. The cells and the group rooms were to be monitored with video cameras and microphone/speakers.

The "living-groups" were to be put together by social workers, psychotherapists, etc., and were to operate by a system of "punishment-reward." The prisoner, on his or her arrival, would be assessed according to his or her will to resist or adapt. Depending on the evaluation, the prisoner would be sent to a group varying from total conformity to "non-adaptation." Far from being "collective," these "living-groups" would instill competition between the prisoners which would undermine solidarity among the prisoners. By a "work-therapy" (i.e. forced labor) and other psychological measures, the prisoners would come to see themselves as criminals or insane. But by adopting the "social values" of the therapists and other prison workers - the values of the prison system, the state, and their corporate bosses - they would rise in the hierarchy among the prisoners, i.e. gain privileges and benefits that then could be lost if they did not behave as desired. There can be no system of rewards without a corresponding set of punishments. Total isolation in the high security wing would be the ultimate penalty.

However, there is not much left of the detention center now. The explosions destroyed the administration building, much of the high-tech security systems, as well as four "residential" buildings. Damages have been estimated at 100 million Marks ($62 million) - 60 million Marks for reconstruction, 40 million for the alarm system. Furthermore, it is predicted that corrections planning would be set back four years as a result of the bombing.

The commandso of the Red Army Faction (RAF) released a communique a few days after the action that demanded the release of the remaining RAF prisoners along with other prison-related demands. But the mass media only printed part of the communique and, interestingly enough, the media did not print one of the demands calling for the release of all HIV+ prisoners.

The commandos took extreme care to avoid injuries to 11 guards who were captured at about 1:30 AM, bound and gagged and driven to a nearby field where they were left in a van. The buildings were searched before detonation and the commandos even put up warning posters on the outside walls of the prison.

Palestinian Political Prisoners

Edited From Democratic Palestine

Israeli prisons are in many respects a microcosm of the Israeli-Palestinian conflict. As places of detention and physical and psychological suffering, they represent in starkest terms the violent essence of occupation. On the other hand, Palestinian prisoners have turned them into fronts of struggle and steadfastness. Thus in the face of often brutally harsh conditions, Palestinian prisoners strive not only to survive but to live in dignity.

There are 30 Israeli prisons, military detention centers and major police lock-ups in the occupied territories for holding Palestinian political prisoners. They are notorious for their lack of basic facilities, such as water and shelter to protect detainees from extreme temperatures. There are also five major police lock-ups which should only hold detainees for short periods of time, but are often used to incarcerate prisoners for months at a time. Although it is forbidden under international law to transfer a detainee from occupied territory to the territory of the occupying power, the authorities routinely imprison Palestinians from the West Bank and Gaza in detention facilities inside Israel.

The Palestinian Human Rights Information Center (PHRIC) reported that at least 120,000 Palestinians, including children as young as 10 years of age, have been detained for a period of more than 24 hours in the first four years and four months of the intifada. Of these, over 15,000 were held without charge or trial in administrative detention. At the time of its April 1992 Update, PHRIC reported more than 13,000 Palestinians in detention. In addition, there are at least 20 detainees from Lebanon and elsewhere being held hostage by Israel, some of them years after having completed their sentences. They are currently being held in administrative detention.

Under military law, Palestinian detainees from the West Bank and Gaza can be held incommunicado for up to 14 days, after which time the Red Cross must be allowed to visit them. Palestinians are not required to be brought before a military judge until 18 days after their arrest. Access to a lawyer is usually denied for 20 to 30 days after arrest, although detainees can be prevented from seeing their legal counsel for up to 90 days by a series of maneuvers in Israeli military law.

It is during this period of being held completely isolated from the outside world and interrogated that the worst abuse and torture of Palestinian prisoners occurs.

Torture is defined under international law as: "Any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiesces of a public official or other person acting in an official capacity." *U.N. Convention against Torture*, Article 1.

In 1991, PHRIC "noted an increase in both the number of Palestinian detainees abused and in the kinds of mistreatment to which they were subjected. In many cases this abuse reached the level of torture." (*From the Field*, February 1992.) The most common types of torture include beatings, particularly on the sensitive parts of the body; handcuffing in contorted positions for hours or sometimes days at a time; sleep and food deprivation; exposure to extreme cold and/or heat; confinement in small cells and isolation. In many cases, detainees are subjected to several different types of torture.

Notably, there has also been a documented increase in the use of electric shock torture against Palestinian detainees, according to Palestinian and Israeli reports. PHRIC documented eight cases of electric shock torture used against young men, aged 14 to 23, in Hebron military headquarters. An Israeli journalist subsequently confirmed PHRIC's findings, and the report was even cited by the U.S. State Department in its annual human rights report.

The use of torture is prohibited without exception by international law in treaties which are binding on Israel. Israeli law also prohibits the use of force during interrogation. Despite these prohibitions, torture is widely used during interrogation of Palestinian detainees. Such practices are justified by the Israeli authorities as falling within the guidelines of the Landau Commission report, issued in October 1987. This report, the outcome of an official investigation into the interrogation methods of the General Security Service (GSS), stated that "moderate physical pressure" could be used against those suspected of "security" offenses. The report lists the "acceptable" types of physical pressure in a secret appendix. That this is effectively an official stamp of approval to the use of torture is borne out by the fact that despite several deaths during interrogation of Palestinian detainees, there has been almost no action taken against security officers.

Indeed, PHRIC reported that a military judge at the Dhahriyeh detention center in Hebron responded to a lawyer's complaint about the use of electric shock against her client by saying it was permitted under the Landau Commission guidelines, as it constituted "moderate physical pressure" and would not kill the detainee. (*From the Field*, February 1992.) The use of torture is obviously well known to the military judges who remand Palestinians in custody for interrogation, and who use their coerced confessions to convict and sentence them.

In addition to judges, prison doctors act complicitly in the mistreatment of Palestinian detainees. Sometimes serving as medical stamps of approval to allow interrogations to continue, they also participate in the abuse of detainees by

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withholding care altogether. The denial of medical care can in itself be a type of torture and is in violation of international law as well as medical ethics.

At least 27 Palestinian detainees have died in Israeli custody during the intifada. They were tortured to death during interrogation; six died after medical care was denied or inadequate; seven were shot to death; three died after being beaten or thrown from a vehicle while being transferred to a detention center; and one died on hunger strike in protest of prison conditions. The number of Palestinian prisoners who have suffered physical or mental injury is countless; abuse and torture are so routine and widespread that it is safe to say that virtually all Palestinians detained by the Israelis suffer some kind of injury during detention.

The response of Palestinian political prisoners to such conditions has been to bring their struggle inside the prison walls. While the exigencies of prison life necessitate struggle virtually every day, collective action, usually in the form of hunger strikes, has proven the most effective tool detainees have in confronting prison authorities. This was recently verified in the largest ever hunger strike, which began on September 27th and lasted two weeks, encompassed some 5,000 detainees in eight prisons in the West Bank, Gaza and 1948 occupied Palestine. The detainees' demands focused on improving prison conditions and changing the military justice system. Among the list of 28 demands were: investigating detention and interrogation procedures and the use of violence by the GSS; setting a time limit for life sentences; establishing an appeal system for long-term sentences; closing military confinement; releasing detainees under 18 years of age; giving prisoners a say in where they're incarcerated; allowing free movement among cell blocks; reducing overcrowding; improving food quality and quantity; improving medical care; increasing family visits and decreasing the number of searches.

The hunger strike sparked the biggest demonstrations in months to support the detainees. In response, the Israeli authorities opened Central Prison in Nablus to local and international media on October 11th, thus attempting to undermine the detainees' assertions of harsh conditions and thereby support their own claim that the strike was a politically motivated action against the peace process. This move was a clear reflection of the occupation authorities' fears that the strike would reignite the intifada and make their position more difficult in the negotiations and in the face of public opinion. Indeed, it is not surprising that as the intifada has waned and an increasing number of activists and leaders are imprisoned, more initiatives for confronting the occupation come from behind prison walls.

The hunger strike resulted in the authorities meeting several of the prisoners' demands vis-a-vis prison conditions. The Israelis agreed, among other things, to improve medical treatment and allow detainees to bring in a doctor of their choice to treat them; increase family visits and improve visiting conditions; allow television and radios; stop strip searches; halt collective punishment; allow food from outside to be brought in; provide warmer clothing; allow more educational opportunities for prisoners; and improve ventilation and replace carcinogenic asbestos with plastic in cells. Of course, there remains the question of implementation. While some steps were taken, the UNL in call no. 89, issued November 1st, found it necessary to "denounce the procrastination of the Zionist prison administration concerning implementation of some items in the agreement to end the strike." The UNL hailed the strike and the results attained by the detainees' struggle, but the success was not without its price. On October 14th, Jussein Asad Obeidat, 26, from Jerusalem, died in Sakalan prison as the strike was drawing to an end.

Despite the obvious restrictions of prison, Palestinian detainees assert an impressive amount of control over their lives by organizing their own unique prison society. As much a means of resistance as a means of survival, this society has its own rules, code of ethics, rewards and punishments.

Prisoners form their own committees on three levels (prison, section and cell) with each organization having its own committee in addition. Decisions about everyday life are made by these committees, from cleaning duty to meting out punishment to rule breakers, as well as decisions concerning relations with the prison authorities. The organizations' committees are elected by their respective members, and from these, representatives are appointed to the general committees. As one ex-prisoner who spent 15 years in Israeli jails commented, "Palestinian prison society is perhaps the most effective democracy in the Arab world."

Activists have termed Israeli prisons "Palestinian universities," because of the emphasis prisoners place on education, political and otherwise; and because the prison experience often strengthens their revolutionary resolve. Detainees spend several hours a day studying and teaching others everything from politics and philosophy to languages and literature. There are regular political lectures and structured discussions. In addition, some of the most famous Palestinian art has been created by prisoners. National and religious holidays are celebrated collectively by the detainees, while sports and games such as chess are the detainees' main recreation.

On both sides of the barbed wire, Palestinians have over the years developed various forms of resistance against the occupation. But it is often within the occupiers' own prisons that the most creative and effective means are found to express the collective national will to survive and flourish.

Letter From Spain

The only thing new is an important increase in the prisoner population. They are filling the prisons to the roof. They have built various new prisons that are already full. Aside from this process, which follows even greater social injustice and inequality, it is due to the proximity of the general elections (in October of 93) and because of it the government has to maintain calm streets. It is a dynamic in which the judges are collaborating to the maximum. Through the mass media a succession of rapes and murders of little girls which occurred recently, have been used to

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mount a whole lynch mob campaign against prisoners by public opinion. This is when faced with an economic crisis (the Spanish economy is at low levels and the unemployment level surpasses 3 million workers, more than 20 % of the working population), and without "enemies" to blame now that the Soviet Union is dismantled and the armed struggle groups in this country are at a level of unprecedented weakness, thus they need to use prisoners as enemies.

As you can imagine the campaign of yellow journalism, sensationalism, morbidity, blood, tears and fears, all of it well orchestrated has achieved a lynch mob atmosphere against prisoners. Its sickening. No one has asked about its causes, like what kind of society is this that creates these dehumanized beings capable of committing such aberrations? Not even from a perspective of effectiveness within the capitalist system has it occurred to them to ask what are prisons for if 80% return, usually for more serious crimes? But of course that is to reach the causes, such as private property and privilege, and that would question their system, therefore its better to discuss the effects.

Pablo Serrano,
Zaragoza, Spain

Control Units and "Democratic" Repression in Chile

In December of 1992 the Chilean government began building an "anti terrorist" prison which is part of that country's new policy in the so called "struggle against violent extremism." This new prison will have a capacity to hold more than one hundred of the so called "dangerous prisoners," who will be isolated in individual cells in which a policy of total isolation and dispersion will be applied. They will only be allowed visits from their family members in rooms separated by glass and bars. The design and construction of this modern prison has required the help of experts from Europe, especially Spain.

According to the new laws, 137 prisoners will become the first tenants of this repressive marvel as they are considered to be terrorists because they participated in armed actions after March 1, 1990, date on which the current "democratic" government took office. In addition there are another 30 prisoners who are political prisoners who participated in armed actions during the dictatorship. The latter have not been given any type of amnesty and their prison situation is the same as that of the so called terrorist prisoners, a fact which has led them to begin a hunger strike in October of 1992, along with a series of actions by friends and family members of political prisoners, such as the occupation of the Cathedral of Santiago during mass. In a recent visit to Brazil the President of Chile declared that in Chile there are no prisoners for purely political reasons, which is contradicted by the recent pardons that he himself granted to four prisoners accused of killing the police chief of Santiago during the dictatorship. He commuted their sentences from life without parole to that of exile, a practice which still continues in Chile today. Just as there is still the death penalty even though it is supposed to be applied in only extreme cases of terrorist conduct.

Also approved was a law which punishes with up to three years in prison anyone who publicly exhibits any type of propaganda of groups considered to be illegal.

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Law Librarian Liable for Access Violations

A Lorton prisoner at the Occoguan Facility brought suit under 42 U.S.C. §§ 1983 and 1988 and the first, fifth, sixth and fourteenth amendments to the constitution. The complaint alleged a pattern of exclusion and harassment in connection with his use of the prison law library. The defendants were the chief law librarian and four administrators and supervisors responsible for providing prisoners with adequate access to library facilities. The defendants moved for summary disposition on a number of grounds, including failure to state a claim and qualified immunity. The district court judge denied the defendants' motion, holding that the allegations of an ongoing pattern of harassment and arbitrary exclusions were sufficient to state a meaningful access to the court's claim for the purpose of surviving a Rule 12(b)(6) motion to dismiss, and that the doctrine of qualified immunity did not shield supervisors or librarian from individual liability.

The plaintiff in this case, Tyrone Martin, claimed that the prison's law librarian would refuse to allow him into the library several times a week, had ejected the plaintiff from the law library without justification, and had locked the law library doors to prevent Martin's re-entry. The complaint went on to allege that on those occasions when the plaintiff was allowed into the law library, the defendant librarian constantly "harassed and berated" him, "hounded" him, shouted "racial epithets" and used profanity when addressing the plaintiff. It was further alleged that the law librarian refused Martin access to law books and periodicals, and, on one occasion, allegedly ordered a library aide to delete the plaintiff's legal pleadings from the law library's computer. According to the complaint, Martin complained about the law librarian's actions to the defendant supervisors and administrators, but they took no steps to correct the situation.

The district court judge held that the ongoing pattern of harassment and arbitrary exclusion alleged by Martin was sufficient to state a meaningful access claim for the purposes of surviving a Rule 12(b)(6) motion to dismiss. "Access to the courts," the court said, "entails not only freedom to file pleadings but also freedom to employ, without retaliation or harassment, those accessories without which legal claims cannot be effectively asserted."

The defendant prison officials argued that Martin had failed to allege any actual injury. The court responded by noting that the "specific injury" rule applies to litigation where a plaintiff seeks relief for an isolated episode of interference with his right of access to a law library or legal materials. In Martin's case an ongoing pattern of denial of access was alleged, the court said.

The defendants next contended that the constitutional claim against them in their individual capacities should be dismissed on the basis of qualified immunity and, in the case of the supervisors, for failure to allege any personal involvement. The court answered by noting that, in the case of the law librarian, "the doctrine of qualified immunity shields government officials from individual liability only when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The right of meaningful access to the courts, the judge held, was clearly established at least as early as 1977, when the U.S. Supreme Court decided *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed. 72 (1977).

As for the supervisors, the applicable law is that the mere negligence of prison officials resulting in interference of the right of access to the courts did not constitute a violation of a clearly established right. Liability nonetheless attached in this case, the court ruled, because the officials were charged with "negligent supervision" rather than simple negligence. This latter question was a close one, but the court concluded that plaintiff was entitled to the benefit of all justifiable inferences at this stage of the proceedings. See: *Martin v. Ezeagu*, 816 F. Supp. 20 (D.D.C. 1993).

Choice Between Exercise and Access Struck Down

The message in this case is that both the right of access to the courts and the right to outdoor exercise are important ones. "To sanction the policy of forcing a prisoner to choose between two important, indeed fundamental, rights," the court held, "is tantamount to denying the prisoner one of the rights."

The plaintiff in this action is a pro se prisoner, named John Allen, who filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against state prison officials in Hawaii. While this case deals with a number of issues, we will address only the question of outdoor recreation versus law library access. Allen alleged it was unconstitutional to make him choose between outdoor recreation and law library time. He claimed that prisoners have a constitutional right of access to the courts, which includes adequate law library time (*Bounds v. Smith*, 430 US 817, 827 (1977)), as well as a

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distinct constitutional right to outdoor exercise (*Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979)).

The state defendants argued that because the plaintiff was allowed out of his cell six hours per week to visit the law library, and could have elected to spend that time at outdoor recreation instead of going to the law library, he failed to state a constitutional violation. In other words, the state claimed they could lawfully force an inmate to choose between two fundamental rights: law library time and outdoor recreation. The court held such reasoning "defies logic," and equated the situation to that of requiring a prisoner to forego meals in order to visit the prison infirmary.

The state also argued that because Allen was confined in the Special Housing Unit (SHU), they could force him to make a choice between law library access time and outdoor exercise time. This contention was rejected on the basis of *Spain*, which held "the denial of fresh air and regular outdoor exercise and recreation constitutes cruel and unusual punishment," and that "some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." It was noted that these principles were recently affirmed in *McKinney v. Anderson*, 924 F.2d 1500, 1507 (9th Cir. 1991). The court continued to address the SHU issue in some detail, and in doing so rejected the state's various other positions. Finally, the court dismissed the defendants claim of entitlement to qualified immunity on the grounds that there was no established right for temporarily segregated prisoners to have both library and out of cell exercise periods.

The discussion of the qualified immunity claim is an interesting one. Readers are encouraged to study the citations on that aspect of the case, as well as those on outdoor exercise for segregated prisoners. The state's request for summary judgement on those issues was denied. See: *Allen v. City and County of Honolulu*, 816 F. Supp 1501 (DC Hawaii, 1993).

Officer's Family Awarded $120,000 for Contracting TB

In what may be an important precedent setting case, the U.S. Department of Justice awarded almost $120,000 to the family of Peter Petrosino, a 57 year old state prison guard at the Auburn, N.Y. prison, who died Oct.24, 1991, as a result of tuberculosis allegedly contracted on the job. The guard caught a rare multi-drug resistant strain of tuberculosis while his duties involved contact with infected prisoners in the University Hospital in Syracuse, N.Y.

The award was made under the Public Safety Officers program, which has previously granted benefits only to families of law enforcement officers killed as a result of shooting or similar physical assaults or accidents on the job. Diseases contracted due to exposure on the job are compensable under the terms of the program, but it appears that no prior similar award has been made.

Source: *National Law Journal*

Service Complete When Delivered to Prison Officials

Brian Faile is a Nevada state prisoner. He sued the Upjohn company claiming that their product Xanax, a prescription drug, caused him depression and violent outbursts which resulted in his being severely wounded by police and imprisoned. The district court dismissed Faile's suit because his opposition to Upjohn's motion to dismiss was late. Faile submitted a tardy opposition and a motion that the court hear it. The court refused to consider Faile's opposition as a sanction for Faile allegedly being late in responding to Upjohn's court ordered discovery requests. The district court dismissed Faile's suit.

The discovery requests in question were post marked two days after the deadline date the court had set. Faile contended he had delivered the discovery materials to prison officials for mailing well before the deadline.

The court of appeals for the ninth circuit reversed and remanded the case.

The appeals court ruled that discovery responses are deemed served and filed the day a *Pro Se* prisoner gives them to prison officials to mail, not the actual date the materials are mailed or received by the opposing party or court. The court gave a good explanation of the important policy reasons behind this rule and cites numerous cases from other circuits, and *Houston v. Lack*, 487 US 266, 108 S. Ct. 2379 (1988), which have supported this rule. The rule is necessary because prisoners lack control over any delays between prison officials receipt of pleadings, discovery responses, appeals, etc., and any delays that may occur after that.

The court ruled: "When a Pro Se prisoner alleges that he timely complied with a procedural deadline by submitting a document to prison authorities, the district court must either accept that allegation as correct or make a factual finding to the contrary upon a sufficient evidentiary showing by the opposing party." See: *Faile v. Upjohn Company*, 988 F.2d 985 (9th Cir. 1993).

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Non-Stenographic Depositions

By Paul Wright

The most crucial part or process of a civil rights suit is the discovery phase. In many civil rights cases the defendants are government employees performing state functions and thus have sole control of the relevant evidence the plaintiff will need to prove his/her case. This is true of prison civil actions in particular. Many prisoner litigants conduct little or no discovery, essentially relying on whatever documents they may already possess or perhaps using interrogatories. Extensive and good discovery is essential to winning any case. The defendant's attorneys know this and their function is to hide or obscure the facts to protect their client, the *pro se* litigant's job is to uncover these facts and bring them to the court's attention.

Interrogatories are useful in cases where the information needed is policy numbers, specific dates, etc., because it allows the recipients to look through their records and verify the information, research answers to questions, etc. The main drawback is that it allows the defendants 30 days to mull over their responses with their counsel, eliminate contradictions if there are multiple defendants, etc. In addition, interrogatories can only be served on parties to the lawsuit, witnesses and others cannot be served with interrogatories.

Depositions, on the other hand, are used to verbally question witnesses and parties in lawsuits. The advantages are obvious: the witness has to answer the questions then and there, in the event of an evasive reply the questioner can rephrase the question, documents can be used as exhibits and the witness can be examined concerning the exhibits. Attorneys rely extensively on depositions.

The problem that prisoner litigants face when they seek to conduct depositions is that because of their general indigence they are unable to afford a court reporter or stenographer to record and transcribe the deposition. This problem can be overcome relatively easily.

Fed.R.Civ.P. 30(b)(4) allows federal judges or magistrates to authorize non-stenographic depositions in civil cases. The court's role should be limited to ensuring that the record produced will be an accurate one. See: *Colonial Times v. Gasch*, 509 F.2d 517 (DC Cir. 1975).

The means of ensuring an accurate record that have been approved by the courts in the past include having a public notary swear the witness under oath, the deposition is recorded by two tape recorders (one for the defendant, one for the plaintiff), labelling the tapes and breaking the plastic tabs to ensure they are not recorded over. The courts that have approved these methods include: *Jones v. Evans*, 544 F. Supp 769 (ND GA 1982); *Champagne v. Hygrade Food Products, Inc.*, 79 FRD 671 (ED WA 1978); *Lucas v. Curran*, 62 FRD 336 (ED PA 1974); *Wescott v. Newman*, 55 FRD 257 (DC NE 1972); and *Kallen v. Nexus Corporation*, 54 FRD 610 (ND IL 1972). FRD stands for Federal Rules and Decisions, it is a series of books that few prison law libraries have; however, they can usually be special ordered from state law libraries.

In the event the deponents are located somewhere else (i.e., you have been transferred to a different prison, the deponents are located in the state capitol, etc.), that is not a problem. Fed.R.Civ.P. 30(b)(7) allows for the use of telephonic depositions. This permits the person conducting the deposition to be at one location, hundreds or thousands of miles away from where the deponent is actually located. For prisoners moved to different prisons or out of state it may be the only way to conduct a deposition. See: *Coyne v. Houss*, 584 F. Supp 1105 (ED NY 1984).

This writer has conducted about two dozen non-stenographic depositions over the years, most of them telephonically. Overall, the process works pretty well. The important thing is that economic limitations are not a barrier to conducting the depositions. These depositions have proven crucial in a number of cases.

The downside to doing non-stenographic depositions is that in order to use them in court it is necessary to transcribe the deposition. It takes me about 8 to 10 hours to transcribe a 90 minute deposition and another few hours to type it up. Obviously this will depend on each individuals transcribing and typing skills, for some it will be easier, for others more difficult. It is very tedious and tiring. It also provides an incentive to keep questions brief and to the point.

Non-stenographic depositions are not for everyone. They take a lot of work to prepare the questions before the deposition, prepare your list of exhibits for the witness and then transcribing the results later. A 90 minute taped deposition translates into an average of 50 double spaced typed pages. For cases involving questions of motive and intent, depositions are ideal. Done right, non-stenographic depositions are an inexpensive way to conduct vital discovery that would not otherwise be possible.

Federal Tort Claims Act Requires Exhaustion

William McNeil was a federal prisoner who was without counsel when he filed his suit under the Federal Tort Claims Act (FTCA). The complaint sought money damages arising from his alleged injury by the U.S. Public Health Service. McNeil submitted a claim for damages to the Department of Health and Human Services, who promptly denied the claim. The district court subsequently dismissed McNeil's complaint as premature under an FTCA provision, 28 U.S.C. § 2675(a), which requires that a claimant exhaust his administrative remedies before bringing suit. The prisoner appealed to the Court of Appeals for the Seventh Circuit (964 F.2d 647), which affirmed the lower court, despite decisions in other circuits that have permitted a prematurely filed FTCA action to proceed if no substantial progress has taken place in the litigation before the administrative remedies are exhausted.

The U.S. Supreme Court granted certiorari and a unanimous court affirmed the court of appeals. The court ruled than an FTCA action may not be maintained when the claimant failed to exhaust his administrative remedies prior

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to filing suit, even if he did so before substantial progress was made in the litigation. The court held that § 2675(s)'s unambiguous text—which commands that "an action shall not be instituted ... unless the claimant shall have first presented the claim to the appropriate ... agency and his claim shall have been finally denied by the agency"—required rejection of McNeil's contention that his action was timely because it was commenced when he lodged his complaint with the district court.

The justices concluded that McNeil's complaint was filed too early, "since his claim had not previously been presented to the Public Health Service nor finally denied" by that agency. Also unpersuasive was McNeil's argument that his action was timely because it should be viewed as having been "instituted" on the date when his administrative claim was denied. In its statutory context, the normal interpretation of the word "institute" is synonymous with the words "begin" and "commence." The most natural reading of the statute indicates that congress intended to require complete exhaustion of executive remedies before invocation of the judicial process. Moreover, the court said, "given the clarity of the statutory text, it is certainly not a trap for the unwary." See: *McNeil v. United States*, ___ U.S. ___, 53 Cr.L 2160 (5-19-93).

Opening Legal Mail States Claim

Miguel Castillo is an Illinois state prisoner. He filed suit under § 1983 after three pieces of legal mail were opened by Cook County Jail officials in an eight month period. The items of "legal mail were marked legal mail," two came from the US district court and one came from the US Department of Justice. Castillo had filed grievances with jail officials concerning the openings without satisfactory results. The district court dismissed Castillo's suit as being legally frivolous.

The court of appeals for the seventh circuit reversed and remanded.

The appeals court reviewed the dismissal for an abuse of discretion. In finding the dismissal unwarranted the court held that the allegations in the complaint were more than adequate to indicate a constitutional violation. The court also held that it was not bound by dicta from *Martin v. Brewer*, 830 F.2d 76 (7th Cir. 1987), which had held that mail from the courts were public documents not subject to the privileged communications protection of being sent "legal mail." It found *Martin* to be inappropriate because in this case "Castillo's mail was marked as legal mail."

Castillo's naming of the Cook County Mail Room Department, a non-suable entity, required that, on remand, the district court grant him leave to amend his complaint and add the proper parties as defendants.

Because Castillo has problems with the English language and has stated a colorable, non-frivolous claim, the appeals court instructed the lower court to appoint counsel to represent him in future proceedings, even though Castillo had not requested appointment of counsel. See: *Castillo v. Cook County Mail Room Department*, 990 F.2d 304 (7th Cir. 1993).

No Waiver of Witness Fees for IFP Litigants

Bobby Dixon is a California state prisoner. He filed suit under § 1983 claiming that he was denied adequate medical treatment by prison officials. The case went to trial before a magistrate judge who granted the defendants' motion for a directed verdict. The ninth circuit court of appeals affirmed the ruling.

The court noted that a party to a federal civil case has a constitutional right to proceed before an Article III judge. Dixon consented to proceed to trial before the magistrate but later changed his mind and wanted a judge. The court notes that "once consent to proceed before a magistrate is given, it can be withdrawn by the court only for good cause shown on its own motion or under extraordinary circumstances shown by any party." There is no absolute right in a civil case to withdraw consent to trial before a magistrate.

Dixon sought to call a witness as a substitute for a previously subpoenaed witness whose illness prevented his attendance at the trial. The appeals court affirmed the magistrate's ruling that 28 U.S.C. § 1915, the *In Forma Pauperis* statute, does not waive payment of fees or expenses for witnesses, citing *Tedder v. Odel*, 890 F.2d 210, 211-12 (9th Cir. 1989). See: *Dixon v. Ylst*, 990 F.2d 478 (9th Cir. 1993).

No Cause of Action for Defamation

Two Ohio prisoners approached a unit supervisor to discuss a cell change; one of them sought to be moved into a cell occupied solely by another prisoner. The supervisor then either directly told them or implied that the cell's occupant was a homosexual. This prisoner sued the supervisor for slander.

The court found that the supervisor's mistaken suggestion that the plaintiff prisoner was a homosexual was defamatory, and that the prisoner suffered "harassment and distasteful invitations," as well as injury to his name and reputation within the prison population. However, he was not entitled to an award of damages, because the supervisor's comments were protected by a "qualified privilege" since he made his comments in the course of the performance of a duty to communicate with the prisoners.

The state Department of Rehabilitation and Correction had initiated a program intended to reduce violence between inmates and which focused on reducing conflicts arising from cell assignments. There was ample evidence that incompatibility often resulted when one, but not both, of the cellmates was a homosexual and that this variety of incompatibility had previously resulted in innumerable fights as well as stabbings. Under the requirements of this program, the supervisor had a duty to express reservations when a non-homosexual inmate sought a transfer into a cell with one who was, or may have been, a homosexual. See: *Key v. Ohio Dept. of Rehabilitation and Corrections*, 62 Ohio Misc. 2d 242, 598 N.E.2d 207 (Ohio Ct. Cl. 1990), reported 1992.

'Some Evidence' Standard Meets Due Process

Prison discipline imposed on the basis of "some evidence" that an inmate has violated prison regulations does not violate the fourteenth amendment's due process clause, a majority of the Court of Appeals for the Eighth Circuit held. In the prison setting, due process guarantees only that inmates will not be subjected to "arbitrary" deprivations, the majority explained. The "some evidence" standard is adequate to safeguard this limited due process right, it said.

Describing the scope of the appellate review, the U.S. Supreme Court has stated that "due process is satisfied if some evidence supports the decision by the prison disciplinary board," *Superintendent, Massachusetts Correctional Inst. v. Hill*, 472 U.S. 445, 455 (1985). The majority rejected the prisoner's argument that *Hill* states only a standard for appellate review. The right to a hearing prior to imposition of prison discipline, established in *Wolff v. McDonnell*, 418 U.S. 539, 555-558 (1974), does not guarantee a full-fledged factfinding hearing, the court said. *Wolff*'s due process standard is a flexible one, leaving considerable discretion to prison officials regarding the day-to-day operation of correctional institutions. After observing that many constitutional deprivations are tolerated on no more than notice and an opportunity to be heard, the appeals court declared that inmates are not entitled to the "level playing field" supplied by the preponderance of the evidence standard.

Dissenting Judge Heaney argued that, in view of the severe consequences of an erroneous determination of prison discipline, due process requires that prison authorities prove their charges by at least a preponderance of the evidence. This ruling overrules a district court ruling that was reported in an earlier issue of *PLN*. See: *Goff v. Dailey*, 991 F.2d 1437 (8 Cir. 1993).

Rules for Appointment of Counsel Clarified

Dee Farmer is a male to female transsexual federal prisoner. She filed suit against BOP officials claiming they were deliberately indifferent to her serious medical needs, in violation of the eighth amendment, by not providing her with medical and psychiatric treatment for her transsexualism. After a two day jury trial Farmer's suit was dismissed.

The court of appeals for the seventh circuit affirmed. The opinion provides an overview of the law regarding transsexuals in prison. The sole issue on appeal in this case was whether or not the district court had abused its discretion in refusing to appoint counsel to represent Farmer at trial.

The court noted that *Jackson v. County of Maclean*, requires that a pro se litigant first attempt to secure counsel on their own. Only after that has failed should the court consider a request to appoint counsel.

The court gave an overview of its past cases governing the appointment of counsel and listed the reasons multiple factor tests have proven difficult to implement in practice.

The key question the district court must resolve is whether, before trial, the pro se litigant *appears* competent to try the case. If the judgement was sensible when made, the fact that after the trial it is apparent that the plaintiff was not competent to try the case after all will not establish error.

In this case the court held that the judge's denial was reasonable because Farmer had been litigating the case since 1988, had prosecuted a successful appeal and the trial itself promised to be a straight forward swearing contest on whether or not she had requested treatment from the defendants. The court noted that besides being an experienced litigator, "Farmer's criminal history of fraud demonstrates possession of an intelligence superior to that of a criminal who relies on brawn rather than brains."

There is no statutory or constitutional right to counsel in civil matters and the courts cannot compel appointment of counsel, see: *Mallard v. United States District Court*, 490 US 296, 109 S.Ct. 1814 (1989). The statute confines the matter to the district judge's discretion, "which we shall overrule only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer and he could not procure a lawyer on his own." See: *Farmer v. Haas*, 990 F.2d 319 (7th Cir. 1993).

Disobeying State Court Order Basis for § 1983 Liability

Ernest Walters is an Iowa state prisoner. He was infracted for allegedly lying to a guard. He was found guilty at a disciplinary hearing and punished. Walters filed a post conviction action in state court and won a default judgement against the defendant prison officials. The state court ordered prison officials to expunge the disciplinary reports from his records, restore his lost good time credits and reinstate him to a lower security level. The defendants sought to set aside the judgement and did not comply with the order even though it had not been stayed. Walters filed a motion for contempt and the defendants abandoned their motion to set aside the judgement and complied with the state court order, nine weeks after it was issued.

Walters filed suit for money damages under § 1983 claiming that the defendants nine week delay in returning him to a lower custody level pursuant to the state court order, violated his due process rights. The district court agreed, ruled in his favor and awarded him four dollars a day for each day spent in the higher security level, for a total damages award of $276. The district court also denied the defendants qualified immunity. Both parties appealed and the court of appeals for the eighth circuit affirmed.

The court ruled that the defendants were not entitled to qualified immunity because any reasonable government official would know they had a duty to comply with a court's unstayed order. That the defendants claimed to have relied on the advice of their counsel was immaterial. This defense

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had previously been rejected in *Slone v. Herman*, 983 F.2d 107 (8th Cir. 1993).

The appeals court held that state court rulings can and do create liberty interests protectible under the fourteenth amendment and subject to enforcement by § 1983.

The court rejected Walters' claims for punitive damages because there was no evidence of evil intent or motive on the defendants part. The court also upheld the lower court's award of damages because the record did not support a higher damage award. The appeals court did agree with Walters' claim that he was the prevailing party and was entitled to litigation-related fees and costs, even though he had not submitted a motion requesting them. See: *Walters v. Grossheim*, 990 F.2d 381 (8th Cir. 1993).

Texas Studies Housing Prisoners in Foreign Countries

By F. Lee Weiss

The Texas Senate approved a measure calling for a study to investigate the desirability of housing state inmates in foreign countries.

State Senator John Leedom, a Republican from Dallas, said that his proposal could save Texas $500 million per biennium. When asked what motivated his proposal, Leedom said he was irritated that the costs to society to house an inmate in Texas is approximately $1,500 per month and that his plan was a way to cut costs.

If the study determines that the plan is feasible, Texas would house habitual and violent offenders in foreign countries. Leedom said he believes that Texans would overwhelmingly approve the plan because they are fed up with the current costly system. "The money saved on housing prisoners and building more facilities could be applied to school funding," he said.

When asked about which countries might be used, Leedom replied "Red China." He added that the Red Chinese are "very sweet people" and that it's certainly "far enough away from Texas." Leedom explained that "two dollars a day hard cash is a lot of money over there, so they will probably have the lowest cost."

If the plan is approved, Leedom explained that the foreign facilities would have to be open to Texas prison officials at any time and that jailers would have to meet Texas standards. "We're talking about a humane place," he said. "We're not talking about a Devil's Isle or anything like that."

Texas prisoner Pedro Montoya said that he felt the concept was a great idea if the goal of Texas prisons is to destroy family life and punish not only the prisoner, but his loved ones as well. "If this plan goes forward, the costs to inmates' families will rise tremendously, especially for telephone usage and visitation," Montoya explained. "I really don't think the plan is workable. What about a prisoner's right of access to the courts? A prisoner would have a difficult time contacting the courts when he is in a foreign country. I guess we will have to wait for the study's conclusion before we know more."

Sanctions Against Pro Se Litigant Reversed

Raymundo Mendoza is a Texas state prisoner. In 1980 he suffered cervical and spinal injuries in a prison accident. He filed suit and his claims were eventually dismissed. In 1991 he filed suit alleging that he had received negligent medical treatment; been denied essential medical care and been unjustly disciplined for refusing to work. The district court held an evidentiary hearing where it found Mendoza's pre-1989 claims were time barred and dismissed the suit as legally frivolous by finding that the allegations did not rise to the level of constitutional violations. The court also imposed Rule 11 sanctions against Mendoza, holding that two suits in an 11 year period were an abuse of the judicial system. As a result of the sanction Mendoza was required to obtain permission from the chief judge before he could file any suits in the future.

Mendoza appealed and the court of appeals for the fifth circuit affirmed dismissal of Mendoza's lawsuit, but reversed the imposition of sanctions. The court noted that negligent medical care does not violate the constitution and thus the suit was properly dismissed.

The court gave a detailed discussion about the imposition of Rule 11 sanctions against pro se litigants (most of whom are prisoners). The appeals court reviews under an abuse of discretion standard. In listing the cases in which sanctions have been imposed and upheld on appeal, the court noted the number of frivolous suits filed by the individual, which ranged from 24 to over 500. In all of these cases the litigant received prior warning before sanctions were imposed.

In vacating the sanction imposed against Mendoza the court noted that this was "Mendoza's second lawsuit and he was given no prior warning that he could be sanctioned. The lower court did not impose the least severe sanction adequate and Mendoza does not appear to pose the same threat as some of the distinguished recreational litigants previously referred to." Thus, the district court had abused its discretion in imposing sanctions. See: *Mendoza v. Lynaugh*, 989 F.2d 191 (5th Cir. 1993).

Ad-Seg WACs Do Not Create Liberty Interest

PLN recently reported *Farr v. Blodgett*, [*PLN*, Vol. 4, No. 6] in which the district court for the Eastern District of Washington held that the Washington Administrative Code (WAC) created a due process liberty interest for Washington state prisoners to remain out of administrative segregation (ad seg). In another case the ninth circuit court of appeals has ruled the WAC's do not create such a liberty interest.

Scott Smith is a prisoner at the Washington State Penitentiary (WSP) at Walla Walla. Smith was placed in administrative segregation while WSP officials claimed to be investigating allegations that he had threatened to assault a prisoner and a guard. Smith filed suit under § 1983 contending his ad seg placement violated his right to due process. The lower court dismissed the suit on grounds of qualified immunity, that

because the WAC's had not previously been held to create a liberty interest the right was not "clearly established" and the defendants were thus immune from damages. The court did rule that Smith retained a due process liberty interest, created by the WAC's, in remaining out of ad seg.

The court of appeals for the ninth circuit affirmed dismissal of Smith's suit on different grounds. The court ruled that the WAC's do not create a due process liberty interest for prisoners to remain out of ad seg. Because prisoners do not have a federal constitutional right not to be placed in ad seg, any such right, which can be enforced in federal court via § 1983, must be created by state law. The court ruled "We hold that the Code's permissive language and its non-particularized standards do not create a liberty interest that requires that Smith remain in the general prison population." See: *Smith v. Noonan*, 992 F.2d 787 (9th Cir. 1993).

Texas Proposes to Build State "Jails"

After decades of costly prison reform litigation under the *Ruiz* decree the Texas Department of Criminal Justice (TDCJ) continues to have serious problems of overcrowding. Overcrowding of state prisons has reduced the TDCJ's ability to receive new prisoners, this has created a huge backlog of convicted felony prisoners in the state's county jails and resulted in litigation to challenge crowding and conditions there. One effect of this has been efforts by the Texas Legislature to create "state jails."

The Texas legislature is considering several proposals to create a "state jail" division of the TDCJ. State jails would differ from prisons in that they would be more "spartan" and less expensive to construct and to operate. They are designed to reduce the county jail backlog, to avoid *Alberti* decision fines in Harris county, and to reserve prison space for violent offenders. The "jails" would adhere to lower standards than prisons.

SB 171- For construction of 10,000 state jail beds has already been signed into law by Governor Richards.

SB 532- Creates a state jail division.

SB 1067 (Whitmire)- Construction of 40,000 more prison beds and creation of a State Jail Felony Division.

SB 5 (Turner)- Construction of 16,000 more jail beds. This bill has passed the Senate and is in the House Committee on Appropriations.

HB 1234 (Hightower)- A proposal for regional jails differs from both the emergency appropriation and Senator Whitmire's concepts. This mandates a new category of "4th degree felons" and the use of regional facilities with local corrections agencies cooperation. Sentencing would allow for 1-4 years of state supervision, including probation or community correction for individuals with no previous felony offense. Those who do not comply with their community supervision could be sentenced for up to six months in a regional jail. Persons sentenced with one prior felony conviction would serve 3 months in the regional jail before community corrections, etc. It could well be that the "spartan" facilities will not include any type of rehabilitative or educational facilities.

§ 1988 Attorney Fees Explained

In two cases involving attorney fee awards for class action prison civil rights suits the ninth circuit court of appeals clarified and explained the standards district courts should follow when they award attorney fees to the prevailing party.

In *Gates* prisoners at Vacaville, CA, sued concerning their conditions of confinement and lack of adequate medical care. The parties entered into a consent decree and the district court awarded the prisoners' counsel over $6 million in attorney fees. The court of appeals for the ninth circuit affirmed in part, vacated and remanded in part.

The court notes that the fee applicant must document hours expended in the litigation and provide evidence in support of their application. The opposing party bears the burden of challenging the prevailing party's hours charged.

Citing extensive cases the court held that lower courts must give clear and concise reasons for its fee awards. Appeals courts review the fee awards for an abuse of discretion. In this case the appeals court vacated the lower court's fee award because the lower court did not give an adequate explanation for its fee award, thus not allowing the appeals court to determine whether or not the lower court had abused its discretion in making the fee award. The court notes that contingency fee multipliers are no longer allowed for the prevailing party due to *City of Burlington v. Dague*, 112 S.Ct. 2638, 2639 (1992), which was decided after the lower court made its fee award in this case.

The court also explains how reasonable attorney fee rates are calculated by the market rate of the relevant legal community, the complexity of the case, difficulty in obtaining counsel, complexity of the issues, etc. A fee enhancement is also appropriate where there will be a delay in the losing party paying the fee (i.e., they appeal the award).

Stewart involves litigation over Orange County, CA, jail conditions, part of an ongoing suit that began in 1975. The attorneys handling the suit moved for attorney fee awards incurred mainly investigating prisoner complaints about jail conditions. The district court granted the plaintiff's counsel fee award request. The court of appeals for the ninth circuit reversed and remanded the case because the lower court did not explain its reasons for awarding the fees it did. As in *Gates*, the lower court did not indicate why it awarded the fees it did, giving the appeals court no basis upon which to conduct its review.

The court gives a detailed explanation of basic fee computations, reasonable hourly rates, fee enhancements, paralegal and secretarial time and attorney fees defending the award on appeal. See: *Stewart v. Gates*, 987 F.2d 1450 (9th Cir. 1993), and *Gates v. Deukmejian*, 987 F.2d 1392 (9th Cir. 1992).

California Visitor Search Ruling Modified

A 13-point injunction concerning searches of visitors to California prisons was scrutinized March 23 and modified in some particulars by the California Court of Appeals, First

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District. The injunction was the result of a suit challenging a program under which visitors' vehicles were subjected to random inspections by drug-detection dogs.

The court said that searches under the program could be upheld as administrative searches, for which probable cause is not required, even though they are more intrusive than searches previously validated under that rationale in California. As for the injunction, the court approved requirements concerning notice and a minimum distance between dogs and visitors. It also said the lower court properly reserved jurisdiction to decide whether to appoint a master or monitor to supervise implementation of the injunction. The court approved some of the time limits imposed by the lower court but added that once a dog alerts to the scent of contraband, probable cause exists and time limits become inoperative.

The court disapproved of portions of the injunction limiting the authorities in taking certain steps when contraband was found. Under the injunction, the discovery of contraband in a vehicle would not be enough, by itself, to justify extending the time limits for a search, requiring the car's occupants to submit to a strip search, or denying visitation rights; instead, those steps would also require the additional factor that the contraband be packed in such a way as to suggest that it was intended for smuggling into the prison. This additional condition is too limiting, the court said. The court also said, contrary to the injunction, that a dog's alert is enough to provide the requisite basis, reasonable suspicion, for a strip search request. And it struck down a provision addressing officers' mistreatment of visitors' property, noting that existing legal remedies were adequate. See *Estes v. Rowland*, Calif Ct.App 1stDist, No. A048296, 53 Cr.L 1054 (4-21-93).

No Right to Cross Dress

Tonya Star, AKA Anthony Jones, is an Illinois state prisoner. Star filed suit contending prison officials had violated his first amendment and equal protection rights by refusing to allow him to wear women's clothing and makeup. Star did not claim to be a transsexual nor to have a medical need to wear women's clothing. The district court dismissed Star's suit.

The court held that prison officials have a legitimate security interest in preventing cross dressing. According to the court, cross dressing would create a security risk by provoking attacks by intolerant or sexually aggressive prisoners. Accommodation would also be burdensome due to the cost and difficulty of stocking women's clothing and make up on the prison commissary.

The court did not find an equal protection violation because other male prisoners are treated equally, i.e. they cannot wear women's clothing either. The court held that women prisoners wearing pants are not comparable to male prisoners wearing dresses and thus justifies differential treatment by prison officials. See: *Star v. Gramley*, 815 F. Supp 276 (CD IL 1993).

The Federal SRA: A Social Experiment Gone Astray

By Lee Alphonso Moore

In 1984 Congress confronted the rise in drug and firearm related crimes by instituting a social experiment. The social experiment became known as the Sentencing Reform Act (SRA) of 1984. Congress assumed longer federal prison sentences—without parole—would serve as a serious deterrent to crime, particularly in the case of those convicted on federal drug and firearm charges. The SRA dealt exclusively with federal sentences and certain facets of federal prisons. To manage the philosophical approach to crime, Congress created the United States Sentencing Commission (Commission) under the SRA. Congress then armed the Commission with the power to promulgate Federal Sentencing Guidelines—to be applicable to those arrested and later convicted on federal charges after the date of the SRA's inception.

The SRA abolished federal parol and opposed rehabilitation. Consequently, the SRA rejected imprisonment as a means of promoting rehabilitation and stated that punishment should serve retributive, educational, deterrent, and incapacitation goals. See, e.g. 18 U.S.C. § 3553(a)(2). In addition, Congress claimed the SRA was created to offset serious disparities among the sentences imposed by federal judges upon similarly situation offenders and make certain the actual date of a prisoner's release. See *Mistretta v. United States*, 488 U.S. 361 (1989).

Nine years have shown the SRA to be ineffective, and longer federal prison sentences—without parole—not to be a serious deterrent to crime. The primary factor for continuing any social experiment is its success. Up to this point, Congress has failed to present evidence indicating that the remedial purposes of the SRA (longer/non-parolable sentences) has served an important governmental objective and is substantially related to achievement of those objectives in its fight against crime. If longer federal prison sentences have not proved to be an effective deterrent to crime; if sentencing disparities remain high; and if prison administrators have all but abandoned educational objectives; then why preserve the SRA in its present form? Also, Congressional members as well as federal judges have cited a number of deficiencies existing in the SRA, which has lead them to believe the SRA is too perplexing and is unmanageable. Consequently, there is absolutely no proof of a compelling need for continuing the SRA in its current form. The expected cure (SRA) for a social ill (crime) has not lived up to expectations, and now suffers grave side effects.

The SRA has contributed to an astounding increase in the inmate population at federal prisons. Today this inmate population is crowded forty-six percent over its capacity. Tensions are enormous, violence is on the rise, inmates are without an incentive to behave, prison costs are astronomical, and there is no relief in sight. By and large, imprisonment is a catastrophical waste of human resources. Simply put, the SRA has not worked.

The Supreme Court has held, when Congress and the President enact a law which confronts a deeply vexing national problem, it should only invalidate the statutory provision for the most compelling reasons. See *Bowsher v. Synar*, 478 U.S. at 736 (concurring opinion). The federal judiciary mandates that the state carry a heavy burden of justification in instances of social experiments and classifications. Compare test wording in *San Antonia School District v. Rodriquez*, 411 U.S. 1 (1973); *Califano v. Webster* 430 U.S. 313, 316-317 (1977). One would believe that in living in the spirit of the law, the same laws applicable to the states should apply equally to the federal government. The federal government should be held accountable for the SRA—and its failure.

If Congress truly desires to make a constructive effort in confronting crime, its vision should be focused on society—not on prisons and punishments. Congress should reconsider its stance on parole, rehabilitation, and personalized sentences more so than punishment. The appropriate starting point for a solution to the societal problems of crime would be to invest in people; job training; education; programs earmarked against drugs and violence; family and community supported programs; and the creation of jobs. It is virtually unrealistic to believe crime will be reduced through longer sentences. The SRA was haphazardly created, and there is truly no compelling need to continue the ill-fated social experiment instituted under the SRA.

Money Damages Available for Consent Decree Violations

Two prisoners at the Georgia State Prison (GSP) filed suit under § 1983 concerning the confiscation of personal property and the procedures at prison disciplinary hearings. In the mid-70's these issues had been litigated as part of a class action suit by other prisoners. The plaintiff class of prisoners and prison officials had entered into a consent decree concerning these and other aspects of GSP's operation. In these two cases the district court dismissed the suits holding that the previously entered consent decrees barred individual litigation on these issues. It ruled that the prisoners only avenue for relief was to file a motion for contempt against the prison officials through the class action counsel.

The court of appeals for the eleventh circuit affirmed in part, reversed in part and remanded the case.

The appeals court held that GSP prisoners seeking injunctive relief for violations of the consent decrees must file contempt motions through class counsel. However, claims for money damages are not subject to this requirement and can still be brought by individual prisoners under § 1983. This ruling clarifies the eleventh circuits recent rulings on this issue in *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993), and *Saleem v. Evans*, 866 F.2d 1313 (11th Cir. 1989).

In this case the court affirmed dismissal of the claims for injunctive relief and reversed dismissal of the claims for money damages. See: *Harper v. Thomas*, 988 F.2d 101 (11th Cir. 1993).

Increasing Parole Review Time is Ex Post Facto

South Carolina's legislature passed a statutory amendment decreasing the frequency of parole reconsideration hearings from every year to every two years. A prisoner filed a civil rights complaint, pursuant to 42 U.S.C. § 1983, claiming the amendment was an unconstitutional *ex post facto* law when applied to prisoners whose offense were committed before the change in the law took place. Gary Roller was convicted of a crime in 1983. In 1986 the law requiring review every two years, instead of the previous one year, was passed by state law-makers. The South Carolina parole board heard Roller's case in 1990, whereupon it advised him that his next review would not be until 1992, some two years later. Roller promptly filed suit. The district court granted the state's motion for summary judgment, mostly on various immunity grounds. Roller appealed.

The court of appeals for the fourth circuit reversed, holding that Roller's claims for declaratory and injunctive relief were not affected by the state's various immunities. The court noted that four other circuits have held that retroactive reduction in the frequency of parole consideration violates the *ex post facto* clause. These were the 7th, 8th, 9th, and 11th circuits (the 9th circuit case was subsequently reversed on other grounds). The appeals court's opinion in *Roller* provides readers with a good analysis of the *ex post facto* clause as it relates to prisoners in general, and to parole hearings in particular. Since this issue is becoming one of increasing importance to convicts everywhere, it should be carefully studied. See *Roller v. Cavanaugh*, 984 F.2d 120 (4 Cir. 1993).

Shackling Plaintiff Violates Right to Fair Trial

Edward Lemons is an Illinois state prisoner. He claimed that while in segregation he was attacked and severely beaten by prison guards. When his case went to trial the judge went along with the defendant's request that Lemons be handcuffed and manacled in front of the jury during the trial. The jury entered a verdict in favor of the defendants and Lemons appealed.

The court of appeals for the seventh circuit reversed and remanded the case for a new trial. The court noted there is a constitutional right to a fair trial in civil cases. Relying on a long line of criminal cases which hold that shackling a criminal defendant in front of a jury may deprive him of a fair trial, the court held that shackling a prisoner-plaintiff in a civil trial may also unfairly prejudice a jury.

This is a case of first impression for the seventh circuit. The court held that the lower court abused its discretion in allowing Lemons to be shackled in front of the jury. The lower court did not hold a hearing to determine what restraints, if any, were needed but erred "by relying on the self serving opinion of fellow penal officers of the defendants." The lower court also compounded the error by not giving

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the jury a curative instruction or taking steps to minimize the noticability of the shackles.

The appeals court also made this ruling as an exercise of its supervisory authority over the lower courts to induce them to follow desirable procedures. The courts supervisory authority is broad and can compel a result not otherwise mandated by the constitution or statutes.

Before a prisoner plaintiff may be shackled during a civil trial the trial court must hold a hearing, before the trial, where the state may try to prove that restraints are necessary. The court may not delegate this discretion to another party (such as the DOC). In this case the delegation of authority was especially injurious because the decision was made by DOC employees who could "hardly be called impartial."

Even if the court does determine restraints to be necessary, after a hearing, the prisoner is entitled to minimal restraints, curative instructions and steps being taken to minimize the appearance of restraints.

The court, in reversing the case, held that shackling Lemons in front of the jury was not harmless error because it undoubtably prejudiced the jury. See: *Lemons v. Skidmore*, 985 F.2d 354 (7th Cir. 1993).

Probation Officers Only Entitled to Qualified Immunity

Charlene Gelatt is a New York state probationer. After being convicted of grand larceny she was placed on probation and ordered to pay restitution. She had her probation supervision transferred to Florida. Richard Wahila is a New York state probation officer. He wrote to Gelatt after noticing she had not paid her restitution. The letter was returned as undeliverable and Wahila sought an arrest warrant claiming Gelatt had absconded from supervision and failed to pay restitution. Gelatt was arrested in Florida and extradited to New York, spending some three weeks in various jails and prisons.

At the probation revocation hearing, Gelatt's Florida probation officer testified that she had monitored Gelatt since she moved to Florida and that Gelatt had fallen behind in her restitution payments after losing her job because of her probation status. The judge dismissed the warrant and released Gelatt.

Gelatt filed suit seeking $5 million in damages for violation of her state and federal rights. Wahila and the defendants moved for summary judgement claiming that probation officers are entitled to absolute immunity from suit.

The district court denied their motion. The court gave an extensive, detailed analysis of the doctrines of absolute and qualified immunity for government officials, with numerous case citations. The court concluded that probation officers, like parole officers, are entitled only to qualified immunity from suit. The court ruled that there were material issues of fact in dispute, requiring a trial to resolve, which prevented the granting of qualified immunity to the defendants. See: *Gelatt v. County of Broome, NY*, 811 F. Supp 61 (ND NY 1993).

9th Circuit Announces New Qualified Immunity Rule

This case arises from the strip searching of arrested AIDS protestors at a federal building demonstration in Portland, OR. While this is not a prison case the appeals court has announced a new rule concerning the qualified immunity doctrine which is often raised by prison officials as a defense in civil rights litigation.

The plaintiffs in this case sued the federal marshalls who strip searched them, after they were arrested, at the federal courthouse. This is a *Bivens* action. The marshalls sought summary judgement on the basis of qualified immunity. The district court denied their motion because in 1989, when the searches occurred, it was well established law in the ninth circuit that law enforcement officers could only search misdemeanor arrestees upon having probable cause to believe the arrestees were concealing contraband. The district court held that the question of whether the defendants had "reasonable suspicion" to strip search the plaintiffs was a factual question for a jury to decide.

The court of appeals for the ninth circuit reversed and remanded. The court held that whether or not "reasonable suspicion" existed is a legal, not a factual, question that can be resolved on summary judgement by a judge and not a jury. Factual disputes which prevent a ruling on qualified immunity should still go to trial. What the appeals court has done in this case is redefine what is a "factual" question as opposed to a "legal" question which will make it much harder for any civil rights plaintiffs to get their case to trial before a jury.

Judge Norris gave a stinging dissent about the effects this ruling will have because it effectively overturns precedent in the ninth circuit and diverges from the settled law in seven other circuits as to the law of qualified immunity. Prisoners doing civil rights litigation in the ninth circuit should read the dissent and be prepared to jump the new hurdles erected by this case. Norris outlined the numerous practical and legal difficulties that will arise from implementing this case in the lower courts. He also gave an extensive analysis of the Supreme Court cases cited by the majority to rebut the claim that their precedent allows the objective reasonableness of a government official's action to be determined by a judge and not a jury. See: *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1992).

US Marshals Liable for Beating

Fred Sandoval is a federal prisoner. While being transported to a court hearing the Marshals Service placed him in a private jail run by the Wackenhut corporation, contracted to the US government. A Wackenhut guard antagonized another prisoner who, thinking Sandoval was the culprit, attacked Sandoval breaking his nose, teeth and cheekbone. Sandoval filed suit against the Marshals Service under the Federal Tort Claims Act (FTCA) seeking damages for the violation of his right to personal safety.

The district court dismissed Sandoval's suit as being "frivolous" under 28 U.S.C. § 1915 (d), the *In Forma Pau-*

peris (IFP) statute. The district court held that the federal government is not liable for actions by its contractors (the Wackenhut employee). Because the assault was not committed by government employees, it was excluded from FTCA coverage.

The court of appeals for the fifth circuit vacated and remanded. The appeals court held that the FTCA's bar to assault claims (28 U.S.C. § 2680 (h)) does not apply in this case because the intentional tort that injured Sandoval was not perpetrated by a government employee thus S 2680 (h) does not apply.

The appeals court held that Sandoval had adequately alleged a cause of action against the government for failing to provide for his safety while incarcerated. While the government is not liable for the torts committed by the non-government employees that it contracts, it is liable for the negligent acts of government employees who place prisoners in the care of contractors who then provide inadequate safety. See: *Sandoval v. United States*, 980 F.2d 1057 (5th Cir. 1993).

Dismissal Error for Failing to Obey Local Rules

Ronald Kilgo is a Georgia state prisoner. When he was in the Fulton County Jail he filed suit under § 1983 because jail officials had repeatedly refused his requests for medical treatment of a back injury and had subjected him to punishment which aggravated the condition.

Kilgo was transferred to different prisons several times over the next two years. He advised the court of his address changes but due to an error by the court, the address changes were not noted. The court continued to mail documents to Kilgo at the county jail whereupon they were returned to the court as undeliverable. Convinced by the string of returned mail that continuing the action was futile, the district court dismissed the complaint for violating local court rules requiring parties to keep the court advised of address changes.

The court of appeals for the eleventh circuit vacated and remanded. The court held that the district court had based its dismissal on the erroneous belief that Kilgo had willfully disobeyed the courts orders. Thus, dismissal was an abuse of discretion. The appeals court held that before dismissal is an appropriate sanction the lower court must find that lesser sanctions would not suffice.

The court also discusses the appointment of counsel in *pro se* prisoner cases. The key to such appointment is whether the *pro se* litigant needs help in presenting the essential elements of their claims to the court. In this case Kilgo was unable to complete complex, lengthy forms required by the lower court to proceed further. The appeals court held: "Unless the court is willing to guide *pro se* litigants through the obstacle course it has set up, or allow them to skip some of the less substantive obstacles, it should not erect unnecessary procedural barriers which many *pro se* litigants will have great difficulty surmounting without the assistance of counsel." See: *Kilgo v. Ricks*, 983 F.2d 189 (11th Cir. 1993).

Ad Seg Right to Eyeglasses and Toilet Paper

Vernon Williams is a California state prisoner in administrative segregation (ad seg) at San Quentin. He filed suit challenging numerous conditions of his confinement. The court granted Williams leave to proceed *In Forma Pauperis*. This is not a ruling on the merits of the case but a determination of whether William's claims, if true, would entitle him to relief from the court. The court gave numerous ninth circuit cites on the issues it discusses which will be helpful to anyone litigating these issues.

The court held that deliberately depriving a prisoner of eyeglasses, soap and toilet paper shows deliberate indifference to a prisoner's eighth amendment rights.

The confiscation of Williams' legal papers states a claim of the denial of his right of access to the courts. The confiscation of a letter sent to him by his mother states a cause of action under the first amendment.

The court discussed Williams' ad seg claims by noting California prisoners have a state created due process liberty interest in remaining out of ad seg. Ad seg may not be used as a pretext to indefinitely confine prisoners. Because Williams made only conclusory allegations about his ad seg placement the court granted him leave to amend his complaint.

The court also briefly discussed Williams' claims of racial discrimination, retaliation and access to legal calls. Ruling that he had not plead sufficient facts to entitle him to relief the court gave him an opportunity to amend his complaint with regards to these claims. See: *Williams v. ICC Committee*, 812 F. Supp 1029 (ND Cal 1992).

WA Repeals Cons Tolling Statute

The 53rd Washington Legislature unanimously amended RCW 4.16.190 to repeal the provision which tolled the statute of limitations for prisoners serving less than natural life terms. The new law went into effect on July 1, 1993. The statute of limitations in Washington State for civil rights and personal injury claims is set by RCW 4.16.080(2) at three years. Until now, that statute of limitations was tolled while a person was in prison. For example, a person had three years from the time they were released from state custody to file suit for any civil rights violations they suffered while in prison.

With the repeal of the tolling statute Washington prisoners will only have three years from the time the incident occurs in which to file suit. The reasoning behind having such a tolling statute was that prisoners were unlikely to sue prison officials while still in their custody and vulnerable to retaliation and that a free person was more likely to be able to find and retain counsel to represent them than a prisoner was.

With the repeal of the tolling statute Washington prisoners will now have to file suit within three years after an incident occurs. For incidents that occurred prior to July 1, 1993, prisoners will have until July 1, 1996, in which to file suit.

Retaliatory Transfer States Claim

Michael Guglielmo is a New Hampshire state prisoner involuntarily transferred to Connecticut. Guglielmo filed suit claiming that his involuntary transfer was in retaliation for his legal activities. He also claimed that prison officials keeping materials about his litigation in his prison file labelled him a "jailhouse lawyer" and would be used against him in future prison classifications, transfers and post conviction proceedings. He also claimed he was found guilty of misconduct at a hearing he was not allowed to attend or contest. The district court granted the defendants' motion to dismiss in part and denied it in part.

The court held that Guglielmo did not state a claim concerning retention of his *pro se* legal materials in his prison file. The court held there was no evidence Guglielmo's litigation had been impaired or that he had been, or would be, penalized by the documents. Moreover, there is no constitutional right in not being labelled a "jailhouse lawyer" (or for that matter, as the court notes, a criminal or terrorist).

The court ruled that Guglielmo had pleaded sufficient facts to support his retaliation claim by showing a chronology of events that infers he was transferred in retaliation for his litigation against prison officials. While prisoners have no right not to be transferred to other states, they cannot be transferred in retaliation for exercising their right of access to the courts.

Because Guglielmo did not claim he was, or would be, deprived of good time credits, placed in segregation, etc., he was not entitled to a disciplinary hearing comporting with minimal due process. See: *Guglielmo v. Cunningham*, 811 F. Supp 31 (DC NH 1993).

California Prisons Grow

Since 1973 the U.S. prison population has tripled. According to a recent study by the Sentencing Project, a record 1.1 million Americans are now behind bars at a cost of $20.3 billion a year. We now have the highest rate of incarceration in the world, far surpassing second place South Africa and more than four times as large as Great Britain. For black males, our incarceration rate is nearly five times that of South Africa. And while the U.S. has been busy building jails, the South African government and the conservative British government have been developing policies aimed at reducing prison populations.

This unprecedented warehousing of prisoners has done virtually nothing to reduce crime. In California, for example, the state spent $3.2 billion in the last decade to build prisons, mostly under Republican regimes, and the prison population has nearly tripled. Yet today the state has the nation's third highest violent crime rate—and the prison system is the most overcrowded in the country. [*Editor's Note: Last year in Washington State, at the height of a similar prison-building binge, violent crime increased 5.8 percent statewide and 8.5 percent in King County.*] Meanwhile, as corrections budgets soared not only in California but in states across the country, other services, including education and various social programs that could help keep people out of jail, have been slashed due to lack of funds.

In fact, prisons are being built faster than California can afford to open them. Delano State Prison, a new $186 million, state-of-the-art penitentiary, has sat empty for more than a year due to lack of funds. A new $214 million, 2400-bed Riverside prison will not open until October 1994, partly because the money isn't there. Last year, the Legislature approved $600 million in bonds for the prisons near Soledad, Susanville, and Madera, a debt that will more than double in several years, in addition to the operating costs.

Yet the number of prisoners is surging forward faster than expected. By June, there will be 8,000 more prisoners than expected, at an additional cost of $50 million this fiscal year and many millions of dollars more annually thereafter. For one thing, prisoners reincarcerated for parole violations are serving more time because, says a department spokesman, "the CDC is concentrating on the most serious types of violations, such as drug use." It costs the state an average of $22,000 to keep a prisoner for one year at designed capacity, and about $12,000 if the facility is overcrowded.

Source: *Pelican Bay Prison Express*

Overcrowding Emergency Measures Get Old

In *Worthington v. Fauver*, 440 A2d 1128 (1982), the New Jersey Supreme Court upheld an order by the governor, under the state's Civil Defense and Disaster Control Act, transferring state prisoners from overcrowded state prisons to county institutions. After more than a decade of extensions by successive governors, the court decided that enough is enough—almost. An 'emergency' within the meaning of the act no longer exists, the court declared, and the executive order is therefore invalid. However, the court gave the state a year to comply with its decision. The court refused to establish a temporal rule of thumb for determining when an 'emergency' ceases to exist. However, noting that the state's good-faith efforts to control overcrowding in prisons have failed, it said that the problem calls for an executive and legislative solution rather than an executive order under the Disaster Control Act. It acknowledged that the legislature could declare a continuing emergency and confer on the governor the authority to deal with it by executive order; or the legislature could enact a statute providing for the permanent centralization of power to allocate state prisoners among county facilities. See: *Gloucester County v. State*, NJ SupCt, No. A-96, 53 Cr.L 1158 (5-19-93).

Default Appropriate for Obstructing Discovery

This is not a prison case but a personal injury suit concerning the faulty design of Suzuki Samurais. We are reporting it in *PLN* because obstruction of the discovery process by litigants is quite common and this is a good case

explaining the sanctions available against not only the parties but also the lawyers who obstruct the discovery process.

A Suzuki Samurai tipped and rolled, severely injuring the driver. The driver and his family sued claiming the design was faulty. Suzuki continually and willfully refused to provide requested discovery material, even after the lower court had ordered them to produce it. The defendants also tried to conceal evidence damaging to their case (namely, a "smoking gun" memo where General Motors declined to sell the Samurai in the US due to its high center of gravity which made it unsafe. The plaintiffs were able to subpoena the memo from GM which exposed the defendant's misconduct). The district court entered default judgement against the defendants and in addition fined each defendant $5000 and each attorney $500 for their discovery violations and also made them pay the plaintiffs attorney fees and costs in bringing the motion to compel.

The court of appeals for the eleventh circuit affirmed the lower court's rulings in their entirety. The appeals court held that default was an appropriate sanction given the defendants history of non-compliance with the lower court's discovery orders. The court gave a detailed discussion of the sanctions available for failure to comply with discovery orders. Default judgement is an appropriate sanction even when not preceded by imposition of lesser sanctions and regardless of the merits of the sanctioned party's case.

Because the defendant's attorneys participated in obstructing discovery and in concealing evidence, fining counsel as well as the defendants was appropriate. Compensating the plaintiffs for their attorney fee's and costs in bringing the motions to compel discovery and for default were also appropriate.

The court comments on the regularity of discovery abuses in federal courts and, in a comment familiar to any litigator, states: "... it is appalling that attorneys, like defense counsel in this case, routinely twist the discovery rules into some of the most powerful weapons in the arsenal of those who abuse the adversary system for the sole benefit of their clients." The court notes that as officers of the court attorneys owe a duty of candor and loyalty to the court before which they practice. See: *Malautea v. Suzuki Motor Co. Ltd.*, 987 F.2d 1536 (11th Cir. 1993).

Prisoners Retain Right of Bodily Privacy

Male Georgia state prisoners filed suit concerning the assignment of female prison guards to prison living units. The prisoners claim that the female guards act unprofessionally when they view male prisoners in their undershorts, showering and using the toilet. They claim that the female guards flirt, seduce, solicit and arouse them to masturbate and exhibit their genitals for viewing. To cover up their unprofessional conduct when discovered by other prison officials, the guards file false disciplinary charges for obscene acts and insubordination. The prisoners claim these practices violate their rights to bodily privacy and due process.

The district court dismissed the suit holding prison officials were entitled to qualified immunity on the privacy claims. The court held the due process claims were barred by a consent decree entered in another suit on the Georgia DOC's disciplinary practices.

The court of appeals for the eleventh circuit affirmed in part, reversed in part and remanded. It held that qualified immunity defenses protect prison officials only from claims for money damages, not from claims for injunctive and declaratory relief. Thus, the lower court erred in dismissing the suit in its entirety.

The appeals court held, for the first time in the eleventh circuit, that prisoners retain a constitutional right to bodily privacy. The court joined other circuits which have previously made this same ruling. The court remanded the privacy claims back to the district court to be weighed under the *Turner* test for reasonableness.

The court held that the due process claims seeking money damages were not barred by the consent decree entered in a separate suit challenging the disciplinary procedures used by the Georgia DOC. The court also remanded this claim to the lower court for consideration. See: *Fortner v. Thomas*, 983 F.2d 1024 (11th Cir. 1993).

Court Reporters Entitled Only to Qualified Immunity

Jeffrey Antoine was convicted of bank robbery in the US district court in Tacoma, WA. He appealed his conviction and ordered a copy of the trial transcript from the court reporter, May Ruggenberg. After two years of delays, filing deadlines passing, time extensions being granted, etc., Ruggenberg admitted she had lost many of her trial notes. Eventually another court reporter was able to piece together enough material from the trial to provide a partial trial transcript. The ninth circuit heard Antoine's criminal appeal some four years after he was convicted. After an evidentiary hearing in the district court it was held Antoine was not prejudiced by the lack of a verbatim transcript in his case and his conviction was affirmed.

In the meantime, Antoine had sued Ruggenberg, and her employers, for money damages resulting from her failure to provide the trial transcript in a timely manner. The district court dismissed the case, ruling that court reporters are entitled to absolute immunity. The court of appeals for the ninth circuit affirmed on that basis, see: *Antoine v. Byers & Anderson, Inc.*, 967 F.2d 592 (9th Cir. 1992). The US Supreme Court granted certiori to resolve a conflict between the circuits as to whether court reporters are entitled to absolute immunity or qualified immunity.

The Supreme Court held that court reporters are entitled to only qualified immunity because their role and functions in the modern court is not one calling for the exercise of judicial discretion nor one which was traditionally afforded immunity at common law. 28 U.S.C. § 753(b) imposes a duty on court reporters to transcribe court proceedings in their entirety, it affords them no discretion in their duties. The Supreme Court reversed the appeals court ruling and remanded the case for further proceedings. See: *Antoine v. Byers & Anderson*, 61 Law Week 4562, June 8, 1993.

Disciplinary Isolation Triggers Due Process

Prisoners suffered a violation of their due process rights when they were ordered into disciplinary isolation with out the notice and hearing procedures outlines in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Massachusetts Supreme Court held. The less demanding procedures prescribed in *Hewitt v. Helms*, 459 U.S. 460 (1983), for administrative segregation are inadequate in this context, the court said.

The inmates were ordered into disciplinary isolation for violations of prison rules but were not provided with 24 hours' notice of the disciplinary proceedings or with a written copy of the disciplinary board's findings and decision. The due process clause itself does not safeguard convicts from being sent to the "hole," but mandatory language in state prison regulations governing disciplinary isolation do provide inmates with a protected liberty interest, the court decided. As to the issue of the process due, the court distinguished disciplinary segregation from administrative segregation.

"Disciplinary segregation is a major sanction that deprives an inmate of exercise time and other privileges, an opportunity to earn good-time credits, and contact with visitors," the court noted. Accordingly, it held that whenever prison authorities impose isolation as a disciplinary sanction, they must follow the advance notice and hearing procedures set out in *Wolff*. 53 CrL 1194 (6-2-93).

Florida Conditions Lawsuit Settled After 21 Years

After 21 years of protracted, time consuming and tedious litigation involving three correction's secretaries, four governors, thousands of inmates and millions of dollars, the Department of Corrections of Florida has finally resolved the legendary *Costello* lawsuit.

"For the first time in 21 years, the state of Florida—not the Federal Courts—has control of our prison system," Governor Lawton Chiles said.

The original suit was brought about because of overcrowding conditions and poor medical care. At a later date the prison food service also became an issue.

According to Corrections Secretary Harry K. Singletary, Jr., resolution of the long standing lawsuit was the result of much hard work by many parties. The lawsuit has been a major focus of many areas in the Florida Department of Corrections. "We are very pleased the courts have recognized our positive efforts aimed at improving care and treatment of our inmates," Singletary said. "It says we've made a great deal of progress." U.S. District Judge Susan Black even said that "we could be viewed as a model for other departments nationwide when it come[s] to dealing with overcrowding and corrections health care. I think her decision speaks for itself."

In delivering the courts opinion, Judge Black said," It is encouraging to see a major state such as Florida, with a significant prison population, taking such a creative step."

The most significant ingredient of the case was the creation of the Control Release Authority (CRA) and the Correctional Medical Authority (CMA) which monitors the way the Department of Corrections provides inmate medical care. According to corrections experts, Florida's CMA is now a national model which is being studied by other states as well.

Source: *Corrections Compendium*

Periodical Reviews

Journal of Prisoners in Prisons is a biannual publication from Canada. Each issue is about 140 pages in length in a bound soft cover book type format. The latest issue (Vol. 4, No. 2) has several excellent articles regarding control units including lengthy, detailed pieces on Marion and events that led to the current lockdown (going on ten years now) there as well as its use as an experimental behavior modification lab. It also contains poems, letters and the articles tend to be well footnoted and referenced. Subscriptions are $10.00 a year for free people, $4.00 a year for prisoners. Write: JPP, P.O. Box 60779, Edmonton, Alberta, T6G 2S9, Canada.

Lifelines is the quarterly tabloid of the National Coalition to Abolish the Death Penalty. Each issue contains articles, news, resources and updates on abolitionist news concerning opposition to the death penalty. It has a religious focus. Recent issues have covered the death of Thurgood Marshall, the execution of Wesley Dodd in Washington state, Supreme Court rulings making executions easier for the states, etc. Subscriptions are $25.00 a year from: NCADP, P.O. Box 600, Liberty Mills, IN. 46946.

TB & Prisons: The Facts for Inmates and Officers is a 17 page booklet published by the National Prison Project of the ACLU. As readers of *PLN* know, there is an epidemic of the resistant tuberculosis (TB) sweeping the nation's prisons. This timely and informative booklet gives the reader a rundown on what TB is, how it is spread, how it is treated, how to know if you have TB, how to safeguard against getting it, etc. This is an excellent booklet on an issue that vitally affects everyone in prison, prisoners and staff alike. The booklet is free for single orders; bulk copies are available. I would suggest prisoners to inform their respective prison administrations of the existence of the booklet and encourage them to purchase it in bulk to distribute to the entire prison population. Another booklet *AIDS & Prisons: The Facts* is also available. Write: National Prison Project, TB Booklet, 1875 Connecticut Ave. N.W., Washington DC 20009.

The Liaison Quarterly is the new quarterly publication of Friends Outside in Tennessee. It is edited by longtime *PLN* supporter Harold Thompson. The first issue explains what Friends Outside does, has reviews, articles on the death penalty, pen pal listings and more. Subscriptions are $5.00 a year to: Friends Outside, P.O. Box 321, Murfreesboro, TN 37130.

City of Refuge

by David Finney

Everyone has heard about alternative sentencing. What about alternative incarceration? The debate should be expanded to encompass this issue too.

When people get put in prison the great majority become distrustful, angry and radicalized. It is a symptom of the seemingly arbitrary and unfair nature of the environment. This is clearly counterproductive. Fully 99% of prisoners will, at somepoint, be released into the community. Wouldn't it be more sensible and efficient if prisoners were paroled, not alienated, but fully functioning and contributing members of society?

The unconscionably high recidivism rate conclusively proves that contemporary prisons are an unmigitated failure. They are, for the most part, destructive environs. It is time to consider a different model for incarceration.

Surveys commonly show that citizens are overwhelmingly in support of incarcerating felons. The results of surveys are often superficial, can be misleading (dependent upon how they are structured) and, most importantly, don't tell the whole story. Focus groups, in contrast, are formed to examine individual reasoning for opinions and beliefs; thus, producing erudite commentary.

When focus groups are conducted to get a better understanding of the dynamics for support of incarceration an interesting phenomenon is revealed. The underlying motivations disclose the primary objective is to protect the community by isolating the offender for public safety. The secondary goal is to rehabilitate the prisoner for successful intergration back into the community to meet the prime objective of long-term civil order. Individuals in focus groups understand it is counterproductive to parole angry, alienated prisoners. They also realize prisons can't rehabilitate people; however, they want prisons to facilitate and encourage that with meaningful opportunities.

In the majority of cases a principal cause of offending can be correlated to dysfunctional family units, poor education and poverty. These elements encourage and reward criminal thinking; hence, abnormal behavior. It is learned behavior. That's the key to rehabilitation because learned behavior can be replaced with different behavioral patterns to substitute for the abnormal. The way to restore offenders is to remedy dysfunctional thinking.

The problem with the contemporary prison model is that it does not attend to this chief cause and, contrarily, exacerbates it. Prisons are unique; nowhere in the world will you find similar social dynamics. They are bizarre, aberrant environs. This, obviously, does not assist offenders in learning how to operate normally. Prisons do just the opposite. They encourage, reinforce and reward antisocial behavior. It is, thus, a breeding ground for alienation, anger and crime. Prison social dynamics are counter-productive to the restoration of an offender's psychological composition. It is extremely difficult for all but the most determined and motivated prisoner to change his or her behavior patterns to conform with societal norms while in prison.

Incarceration has a place in the array of punishment alternatives. There are other ways, as opposed to the contemporary prison model, to isolate the offender for public safety without radicalizing and alienating the prisoner. Perhaps it is time to dismiss the obsolete and hoary school of thought that the primary function of incarceration is to punish. It is time to take a more humanistic approach and rearrange the objectives so that isolation and restoration take precedence.

Wouldn't it be more realistic if prisons closely approximated a normal social environ to train, encourage and reward normal behavior? Could this be achieved and still accomplish the main objective of public protection with isolation?

There is a solution to these seemingly incongruent objectives. Civil order and protection can be achieved with isolation and still provide a relatively normal living environment so the offender is not alienated and is encouraged to become a contributing, productive member of the community upon release.

On the Kona Coast of the Island of Hawaii there is a restored ancient village called the "City of Refuge." When this fishing village was inhabited it was a permanent sanctuary for offenders who were at risk of blood revenge. Each of the Hawaiian islands had one or more Cities of Refuge. They were sacred, religous grounds and were governed by a priest. If an offender was able to get within the volcanic rock wall boundary they were safe from retribution. If, however, the offender was caught any time thereafter outside the boundaries the victim or a relative could dispense blood revenge. Offenders were exiled to this fate forlife. What is interesting is that there was less crime within the City of Refuge than in other villages.

These fishing villages were self-contained, self-supporting and functional, receiving no assistance or subsidies. Fishing and farming were the means of support, like other traditional communities. To preserve familial continuity the offender's family could live within the City of Refuge with the offender.

Perhaps we could use this model at a contemporary prison. This concept would satiate all the objectives focus groups have identified and in a priortized manner. A contemporary City of Refuge could encompass all the dynamics of a normal community. There could be a secure perimeter guarded like traditional prisons. Offenders could be vetted for suitability to reside in the community. The prisoner's family could live in the City of Refuge with the offender and come and go with little restriction. Each family would be self-supporting; paying for all necessities like shelter, food and medical expenses. All of the necessary services and goods could be supplied within the confines of the City of Refuge. Prisoners would be held within the city for the duration of their sentence. Offenders could be employed by private industry sited within the city-prison. Family members could be employed therein or in outside communities.

Prison Legal News

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Exposure to Secondary Smoke Can State Claim

Donald McKinney was a Nevada state prisoner who filed a civil rights complaint against prison officials, pursuant to 42 U.S.C. § 1983, claiming that his involuntary exposure to environmental tobacco smoke (ETS) from his cellmate's and other inmates' cigarettes posed an unreasonable risk to his health, thus subjecting him to cruel and unusual punishment in violation of the eighth amendment. A federal magistrate granted the state's motion for a directed verdict, but the Court of Appeals for the Ninth Circuit reversed in part, holding that McKinney should have been permitted to prove that his ETS exposure was sufficient to constitute an unreasonable danger to his future health. It reaffirmed its decision after the Supreme Court remanded the case for further consideration in light of *Wilson v. Seiter*, 501 U.S. ___, in which the high court held that eighth amendment claims arising from confinement conditions not formally imposed as a sentence for a crime require proof of a subjective component, and that where the claim alleges inhumane confinement conditions or failure to attend to a prisoner's medical needs, the standard for that state of mind is the "deliberate indifference" standard of *Estelle v. Gamble*, 429 U.S. 97. The Ninth Circuit subsequently held that *Seiter*'s subjective component did not vitiate that court's determination that it would be cruel and unusual punishment to house a prisoner in an environment exposing him to ETS levels that pose an unreasonable risk of harming his health—the objective component of McKinney's claim.

The state of Nevada appealed that ruling to the U.S. Supreme Court which, on June 18, 1993, upheld the lower court by deciding that it was not improper for the Ninth Circuit to rule on the question of whether McKinney's claim could be based on possible future effects of ETS. From its examination of the record, the high court held, the lower court was apparently of the view that the claimed entitlement to a smoke-free environment subsumed the claim that ETS exposure could endanger one's future, not just current health.

The essence of the Supreme Court's ruling in this case was: By alleging that the state of Nevada has, with deliberate indifference, exposed him to ETS levels that pose an unreasonable risk to his future health, McKinney has stated an eighth amendment claim on which relief could be granted. An injunction cannot be denied to inmates who plainly prove an unsafe, life-threatening condition on the ground that nothing yet has happened to them. See *Hutto v. Finney*, 437 U.S. 678, 682. Thus, the state's central thesis that only deliberate indifference to inmates' current serious health problems is actionable was rejected. Since the Supreme Court could not at that juncture rule that McKinney cannot possibly prove an eighth amendment violation based on ETS exposure, it also would be premature to base a reversal on the federal government's argument that the harm from ETS exposure is speculative, with no risk sufficiently grave to implicate a serious medical need, and that the exposure is not contrary to current standards of decency. On remand, the court continued, the district court must give McKinney the opportunity to prove his allegations, which will require that he establish both the subjective and objective elements necessary to prove an eighth amendment violation.

With respect to the objective factor, the court said, McKinney may have difficulty showing that he is being exposed to unreasonably high ETS levels, since he has been moved to a new prison and no longer has a cellmate who smokes, and since a new state prison policy restricts smoking to certain areas and makes reasonable efforts to respect nonsmokers' wishes with regard to double bunking. He must also show that the risk of which he complains is not one that today's society chooses to tolerate. The subjective factor, deliberate indifference, should be determined in light of the prison authorities' current attitudes and conduct, which, as evidenced by the new smoking policy, may have changed considerably since the court of appeals' judgment. The inquiry into this factor also would be an appropriate vehicle to consider arguments regarding the realities of prison administration.

Justices Thomas and Scalia dissented, setting forth the notion that the eighth amendment does not apply to prisoners at all. See: *Helling v. McKinney*, ___ U.S. ___, 61 LW 4648 (6-15-93).

Placing Con in Cell with Dying PWA Doesn't State Claim

Woodrow Johnson is a federal prisoner confined at FCI Talladega, Alabama. The suit was instituted *pro se* pursuant to the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2674, *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999 (1971), and 28 U.S.C. § 1331, wherein he alleged that he has been deprived of his constitutional rights by the actions of the defendant officials of the Bureau of Prisons

Continued on next page...

(BOP). Johnson sought injunctive relief and monetary damages.

Johnson contended that the BOP violated his eighth amendment rights by housing him in the same cell with a prisoner who was dying from Acquired Immune Deficiency Syndrome (AIDS). He alleged that his former cellmate tampered with his toothbrush, toothpaste, and razor blade; in addition, on several occasions, he observed his cellmate's blood on their sink, toilet and towels. He alleged that during the last few days prior to his cellmate's death, he was forced to "feed and sanitize" him. Johnson's cellmate subsequently died. While Johnson has tested negative for HIV, he complains that he was damaged psychologically because he was subjected to witnessing his celllmate's deteriorating condition.

In granting the government's motion for summary judgement the district court relied on *Wilson v. Seiter*, 501 U.S. ___, 111 S.Ct. 2321 (1991), the same case the U.S. Supreme Court recently relied on in holding that placing a non smoking prisoner in a cell with a heavy smoker could state a claim [*See article page one*]. The district court said Johnson's fears that he may have contracted AIDS are based on "unsubstantiated fears and ignorance." The court went on to conclude that the plaintiff "has not been deprived of any basic need. He has not presented the court with any facts... from which it might be inferred that the decision to house an AIDS infected inmate with the plaintiff evidenced a deliberate indifference to his serious medical needs or a culpable state of mind on the part of the defendants." See: *Johnson v. United States*, 816 F. Supp 1519 (ND AL 1993).

AIDS Patient Released from Jail

Gregory Scarpa is a pretrial detainee with full-blown AIDS. He is an alleged mafia captain awaiting trial on charges of racketeering, various murders, murder conspiracies, etc. While on bail previously he was involved in a shoot out and, according to the government, continued his loan sharking activities.

The court granted Scarpa's motion for release because of his poor health, inadequate medical facilities at the Metropolitan Correctional Center (MCC) and trauma to his family based on the prospect of his continued health decline in jail without adequate, humane care in the waning days of his life.

The court gave a detailed discussion of the relevant law concerning release of accused defendants on bail. Applying the law to the facts the court held Scarpa's release was warranted. The court noted terminally ill patients are on a different calendar than healthy defendants and the effect their suffering has on their families. Despite his proven dangerousness Scarpa was released on a $1.2 million bond as long as he paid for at least 2 US Marshals to guard him 24 hours a day, seven days a week at $15.00 an hour.

The court held: "Overriding principles of our system of justice require the conditional release of defendant despite his proven dangerous propensities. We do not punish those who have not been proven guilty. When we do punish, we do not act cruelly. Continued incarceration of this terminally ill defendant threatens both of these fundamental characteristics of our democracy. The fact that defendant may have been a cruel and vicious murderer without compassion for his victims does not permit the law to descend to his alleged level of depravity." The court opinion lists the conditions of Scarpa's release.

This case illustrates the cozy relationship the mafia and US government have, going back to the mafia being hired to kill Fidel Castro, J. Edgar Hoover denying their existence, etc. Prisoners dying of AIDS is a daily occurrence in the American jail and prison systems. Most of these prisoners are poor who cannot afford any $1.2 million bonds. Since when has inadequate medical care been a grounds for release for poor prisoners? While it's good that Scarpa was released on bail, PWAs (people with AIDS) should take this as the isolated aberration it is. See: *United States v. Scarpa*, 815 F. Supp 88 (ED NY, 1993).

NYC Jails Breeding TB

New York City's jails are a breeding ground for tuberculosis, with inmates 10 times as likely to catch the disease as the general public, according to a city report.

"The New York City jail system may be an important amplification point in the ongoing tuberculosis epidemic," wrote Dr. Eran Y. Bellin, the director of infectious disease control at Rikers Island.

His study was published early last month in the *Journal of the Medical Association*.

Bellin conducted his study among 2,636 inmates who tested negative for tuberculosis upon admission at Rikers

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over a one-year period. Follow-ups were conducted on all the inmates to determine if they contracted the disease after their jailing.

While the rate of tuberculosis infection among the general city population is about 50 per 100,000, the 1991 rate among the study group was 500 per 100,000, said Bellin. The study ran through 1992.

Inmates who spent one full year in Rikers were 2.2 times as likely to contract tuberculosis as those jailed for the average stay of 65 days, the study showed. Inmates above the age of 30 were 2.4 times as likely; inmates sent to the detoxification unit were 4.3 times as likely.

Bellin's study at Rikers Island confirmed health officials' concern about jails and tuberculosis contraction, the doctor said. The city had already taken steps to control the disease in its jail system based on early indicators, Bellin said.

"Instead of waiting for the data, we were working on this problem already," said Bellin.

The city's plan for combatting tuberculosis among inmates includes aggressive chest X-Ray screening, state-of-the-art techniques for identifying the disease, education and follow-up phone calls upon release, said Bellin.

Source: *Corrections Digest*

Women Prisoners Hold AIDS Walkathon

The April 24, 1993," Fight AIDS" Walkathon, held at the women's maximum security Shawnee Unit of the federal prison in Marianna, FL, was a great success. Eighty women participated, walking 1636 laps, over 300 miles. Over 90% of the prisoners joined in the effort, even the three women in segregation walked, pacing in their punishment cells. To date we have raised $3,232.00 for Bay AIDS Services and Information Coalition (B.A.S.I.C.) in Panama City, Florida.

For the afternoon, we were joined by Mike Lester and Star, two members of the organization and Persons With AIDS (PWAs). They spent the time talking to small groups of women about living with HIV/AIDS and strategies for survival.

For the women of Shawnee, participation in the Walkathon was an expression of solidarity with their fellow prisoners infected with the virus; an act that united the unit family behind the fight to defeat this disease and the rejection of the fear and ignorance that often characterize the reaction to the presence of HIV+ individuals in prison.

The high level of participation and the interest expressed by the women in future activities has given our group a stronger foundation. In the next month we will offer the AIDS education class in Spanish. The Walkathon strengthened our relationship to BASIC. It is our goal to establish an ongoing working relationship with the organization.

By organizing the Walkathon, we wanted to give back to the community some of what the movement against AIDS has given us in the form of ideas, materials and support. We wanted BASIC and the community outside to remember its incarcerated sisters and brothers. It worked.

Source: *Shawnee AIDS Awareness Group.*

Washington Women in Prison

By V.M.

This has been called "The Year of the Woman" in the field of politics, but apparently those politics extend only as far as the media. Certainly there is no evidence of discrimination or abuse coming to a halt within the confines we live in here.

Since the beginning of the year, and the "christening" of the female superintendent we now have "in power" here, our hopes that there would finally be some recognition of the obstacles we face here, have all but been systematically murdered.

For years we have had to deal with receiving the "trickle down" from the monies allocated to the men's institutions regarding funding for the programs we need. It has always been a battle for us to receive any type of educational or vocational training beyond a GED, and now with the new administrative take over we've been forced to endure, a new policy has gone into effect stating that once a GED has been acquired by an inmate, her educational needs are secondary to working in an assigned institutional job. These "jobs" consist of janitorial, gardening and kitchen work. We here at WCCW are wondering how many employers would jump at the chance to hire a female offender with a resume that consists of picking up cigarette butts or washing pots and pans.

It is common knowledge, at least to us here, that society has not evolved beyond the stigma attached to female offenders. The majority of the women that are placed in prison have low, if any, self esteem. Most also, though not unintelligent, are severely limited in resources available to them, have depended mainly upon the men that ultimately led to their incarceration. And still more have been mentally, physically and emotionally abused to the point of having no willpower left to draw from.

Not all, but several of us here, have the desire to acquire the skills and education necessary to break the pattern our lives have been in, yet upon coming to prison, rather than having these things made available to us, we have obstacles thrown in our paths every step of the way.

Society constantly screams about the recidivism rate and the cost of incarceration, yet not a thing is done to provide us with the opportunity to change. For some reason unknown to me, no one has figured out that if you take a person and thrown them into a man's version of hell for an indefinite period of time, and then release them back into society, that person has no alternative but to go back to the only thing they know, be it drugs, robbery, prostitution, or any number of activities frowned on by society, yet for us, is a matter of survival.

Aside from the fact that our educational/vocational "privileges" have been deemed a luxury, to add further insult to injury, the ONLY women's support group in the institution for battered women, has also been canceled. This despite the fact that the majority of the population here are the victims of abuse. We are wondering if it stems from the new bill before the legislature that would give battered

Continued on next page...

women with extenuating circumstances a chance at time reductions, or if it's merely the administration's desire to ensure that we have no resources available to us.

Combine that with all the things that we have had taken from us that were labelled as "security issues" to justify their actions, yet are still available in the men's institutions, and you have the ingredients for blatant discrimination.

The women here, though apparently forgotten and shunned by society and its advocates, are your mothers, sisters, aunts, and in many cases, the bearers of the generations to come. This seems to be of no concern to the majority out there, but maybe the next time one of you pick up a newspaper and read about an ex offender reoffending, you'll think about the reason behind the actions. [*V.M. is a prisoner at the Washington Corrections Center for Women at Gig Harbor, WA.*]

New Prisoner Resource Guide Available

The Prisoner Rights Union in California has published their *1993-94 Resource Guide.* While the guide will be especially useful to prisoners in California it contains a lot of helpful information for prisoners anywhere. It is 56 pages long and literally filled with information.

For those located in California it contains information like the addresses of all prisons, courts, public defenders, etc., in the state. Of interest and use to prisoners everywhere is the national listings of AIDS resources, arts, death penalty, gay/lesbian services, legal assistance, publications, parolee services, veteran assistance, visiting, pen pal programs, women's services and much more. The guide also has a table of contents and an index which allows easy use to locate specific programs and such.

The Guide is only $10.00 apiece for 1-5 copies. It is available at lower prices for bulk purchases. Well worth checking out. This document is an excellent addition to prison law library reference sections. Write: PRU, P.O. Box 1019, Sacramento, CA. 95812-1019.

Harassment of Jailhouse Lawyer Violates Access to Courts

A prison guard's harassment of inmate paralegals is actionable under 42 U.S.C. § 1983 as a violation of other prisoners' right of access to the courts, which was recognized as a constitutional right in *Bounds v. Smith*, 430 U.S. 817 (1977), declared a U.S. district court in New Jersey. Assuming that the prisoners' factual allegations are true, the court said that if the prison paralegals are necessary for the prison to meet its obligation under *Bounds*, then their harassment violates the fourteenth amendment's due process clause. The court said further submissions on the nature of the assistance provided by the jailhouse lawyers would be necessary before the issue can be resolved. Also in need of further review is the question of whether the Prisoners' Legal Association (PLA), a group of prisoners to which the paralegals belonged, has standing to assert the prisoners' due process claim. The court appointed an attorney for the association to brief this question.

Members of the PLA are trained by the prison to serve as paralegals for other prisoners. Without ruling definitively on the question, the court hinted strongly that the prison could not meet its *Bounds* obligations without the legal assistance provided by the paralegals.

There is no need for the plaintiffs to demonstrate an actual injury as a result of the defendant's alleged harassment, the court added. Prior cases, such as *Kershner v. Mazurkiewicz*, 670 F.2d 440 (3rd Cir. 1982), imposing an "actual injury" requirement on right-of-access claims are limited to alleged denials of peripheral resources, such as pencils and notepads, it said. When the central resources required by *Bounds* are abridged, an actual injury necessarily occurs. See: *Prisoners' Legal Association v. Roberson*, 53 CrL 1237 (6-16-93), DC NJ Civ. No. 91-4460 (HLS).

English Only Rule Not Applicable to Group Prayers

A prison rule requiring prisoners to communicate in the "English language only" can not reasonably be construed to apply to prayers, the U.S. Court of Appeals for the Ninth Circuit held in a civil rights case. Therefore, the court concluded, prison officials violated a prisoner's due process rights when they punished him for praying aloud in Arabic. The prisoner, a convert to Islam, was praying in unison with another when he refused a guard's order to follow the "English only" rule; as punishment, he was confined in disciplinary segregation for two weeks. The plain meaning of the rule, the court said, forbids non-English interchange of information between or among humans, not between humans and God. If the rule were intended to apply to communications with divine beings, the term "prayer" would have been used. Finally, the court noted that if the rule could be stretched to include prayer, it would provide inmates insufficient notice and would therefore violate due process. See: *Conner v. Sakai*, 53 CrL 1242 (6-16-93), ___ F.2d ___ (1993).

Should You Tell a Potential Employer You're an Ex-Felon?

By John Adams

I'm a prisoner at the Washington State Penitentiary in Walla Walla, Washington, as well as a student at the Walla Walla Community College currently working for my AAAS degrees in Business Management and Bookkeeping. All the business courses I've taken are designed to teach you how to find a job in the business world; however, for an ex-convict there is much more to gaining employment and keeping your job than is taught from a textbook.

The reality of the situation is that you will be an ex-convict. That label will never leave you. Potential employers may not want to hire you because of that label. You may already realize this. When you are released and it comes

time to get a job you are going to have to ask yourself: *Should I tell a potential employer that I'm an ex-felon?* Since the law pretty much controls our (prisoner's) lives, let's see what the law has to say about ex-offenders employment rights.

RCW 49.60.010 provides that practices of discrimination based on race, creed, color, national origin, sex, marital status, age or handicap are a matter of state concern. The statute recognizes that discrimination threatens not only the rights and proper privileges of all persons, but menaces the institutions and foundation of a free democratic state.

RCW 49.60.120(3) authorizes the Human Rights Commission to "adopt, promulgate, amend, and rescind suitable rules and regulations..." to prevent discrimination in the work place on the basis of race, creed, color, national origin, sex, marital status, age or sensory, mental or physical handicap.

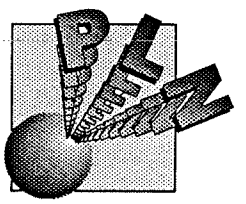
The Human Rights Commission promulgated WAC 162.16.060 declaring that an employment practice which automatically excludes a person with a prior criminal conviction has the potential for discrimination. Paragraph (3) of the regulation states in part: To the extent that an employment practice automatically excludes persons with convictions, it has the potential for discrimination because of race and ethnic origin. See: *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971). This is because minority groups in our society have experienced unequal law enforcement. On the other hand, an employer should have the right to exclude persons who have been convicted of certain kinds of offenses from consideration for certain kinds of jobs, at least if the conviction is relatively recent and the exclusion is done on a carefully considered basis.

As commendable as the Human Rights Commission is for taking steps to help ex-offenders secure employment and successfully reintegrate back into society, unfortunetly, the Washington courts don't agree that ex-felons are a protected class of person under the discrimination laws. In *Gugin v. Sinco, Inc.*, 68 Wn.App. 826 (1993), the court found that the "Human Rights Commission created a new protected class of persons...convicted criminals...and their actions exceeded the legislative grant of authority for state agencies to enact their own regulations." WAC 162.16.060 was held invalid.

You can see that, as an ex-felon, you don't have the same employment rights as a citizen who has never been convicted of a felony. Despite this fact, you shouldn't leave prison thinking you're socially and economically disadvantaged. You don't need to advertise that you are an ex-felon, but there is a time and a place to be honest about your incarceration and a potential employer is that time and place.

You may be thinking "if they know about me, they will reject me." Some employers may, others will not. Don't just tell the potential employer that you were in prison; also tell them what you did while you were incarcerated. "I worked for X amount of time. I learned a vocational skill. I got a vocational or educational degree in X." Chances are the employer may think that you wouldn't be trying to get a job in the first place if you intended to continue to break the law.

If you haven't done anything productive during your incarceration to help you successfully reintegrate back into society, most likely you don't want to get a job anyway and will be one of those statistics of recidivism.



The Black Political Voice

By Gerald D. Fuller

Maryland's disenfranchisement statute has its roots in the federal constitution. The state would have its citizens believe that Maryland's election laws which govern disenfranchisement are fair and impartial and are not discriminatory where blacks are concerned. It is precisely because a citizen can lose his franchise rights due to criminal conviction that Maryland's law would be unconstitutional, for the reason that blacks are disproportionately subjected to criminal convictions, and are targets for disenfranchisement. Maryland has a historic pattern of incarcerating blacks in greater numbers than any other racial group. Their incarceration occurs at from a 2-1 ratio to a 3-1 ratio to that of whites.

In 1990 there were 17,057 people incarcerated in Maryland. Of that number 12,695 were black. That is a disproportionate representation of blacks within the Division of Correction. In 1988, an election year, Maryland incarcerated 7,486 people, of that number 4,649 were black people. You would think that blacks outnumbered whites in the state, or were responsible for more crime than whites. The 1984 election year incarceration was hardly any different, Maryland incarcerated 3,592 in that year, of that number 2,358 were black. This incarceration pattern remains consistent from 1926 through 1990.

By the sheer numbers such a conclusion makes it impossible for blacks to have a greater criminal tendency than whites. But what does take place is that where there are concentrations of blacks, more criminal justice dollars are targeted which result in greater police presence and larger court systems that must justify their existence. Courts, police and militia have historically been used to control blacks. Nevertheless, the pattern is consistent from 1926 through 1992, black communities are the central targets of police, while equally they suffer the higher unemployment rates and number of broken families headed by females who find welfare more certain for sustaining life and health than a black male.

It is well established from a sociological point of view that insufficient economic means to achieve a quality lifestyle based on indoctrinatively induced expectations leads to increased deviant behavior. Or, where in the case of Maryland, the elite who control power endeavors to maintain that power and position and the trappings that come with it, orchestrate circumstances in urban areas where blacks are most often concentrated, so as to control the political voice. An example would be in the case of Montgomery County,

Continued on next page...

Maryland, which in many senses is a state within the state. This county has its own separate laws that are passed and enforced by the state legislature. It is a special area in the state, with special status not enjoyed by other areas, which may be due to the level of concentrated wealth. The premise is that the wealth breeds attitudes that in turn produce increased crime in urban areas, and where with increased police presence cause incarceration rates for blacks to rise to disproportionate levels.

In 1990 there were 12,695 blacks incarcerated within Maryland's Department of Corrections who could not vote, not counting those who already served sentences and who were on probation, parole or locked up in hospitals or local and county jails, or who have two or more infamous convictions already. In fact, as many as 56 % of black males of voting age in Baltimore City are under the jurisdiction of the court on any given day. It is argued that because of Maryland's law, these individuals lose their right of franchise due to criminal convictions and that such a conviction rate is deliberately done by the orchestration of situations within the state and in their communities that lends itself to the snaring of blacks.

The fact is that Maryland has a historic pattern of incarcerating blacks at disproportionate rates, and therefrom taking away their political voice. That the net effect of such activity is the systematic disempowering of blacks and the watering down of black political power in the state, which allows for the election from black districts of those who do not truly represent the interests of blacks, and who in turn promote such policies that increase the chances that black men, women and children will end up behind the wired walls and fences of rural areas where their bodies will create jobs for others.

The history of black suffrage is replete with laws erected that have incapacitated the black political voice. They have ranged from poll taxes lodged against people without the economic means to afford such expense, to literacy testing so constructed to prevent the exercise of their franchise rights. Blacks have been intimidated, threatened and murdered by elitist groups intent on preventing them from voting. The use of the criminal justice system is the newest means by which the disenfranchisement of blacks takes place and Maryland has long practiced it. The problem occurring now is that many whites are being caught up in the net.

It is typical of the elitist caste who would suggest that laws that they can twist to benefit them at the expense of other citizens are fair laws. The reality is that blacks in Maryland are little better off than slaves since their political voice requires sanctioning by white voters.

When the constitution is examined, it is discovered that blacks were never intended at the time of its drafting to have the vote. There were deemed as being less than whole persons and the property of white men. [*U.S. Constitution, Art. 1, § 2 para 3*]. They were further excluded from being defined as citizens in subsequent court decisions such as *Scott v. Sanford*, 19 HOW 393-633, 701-707 (1856), neither the 13th, 14th or 15th amendment corrected their status as less than complete US citizens. More at heart is the fact that it was never intended that blacks so freed from slavery should remain in the United States and the federal government itself sought to limit the growing numbers of blacks.

Therefore, when the state of Maryland is examined as to its treatment of blacks with regard to their franchise rights, it is fairly easy to establish that the criminal justice system is being used as a means to limit the black political franchise. As such the courts should find that it is unconstitutional to use incarceration and economic deprivation as a means of disenfranchising blacks in Maryland. The net effect of such disproportionate incarceration is the lowering of the numbers of eligible black voters.

Campaign of Repression

By Mumia Abu Jamal

The most repressive regime in America just got more repressive. In November, 1992, the Pennsylvania (PA) Department of Corrections implemented revised administrative directives 801/802. [*Editors Note: These rules affect only prisoners in administrative and disciplinary segregation.*]

With planned restrictions barring all but personal and legal mail and a ban on all books (save a Bible or Qur'an), it is a broad based attack on the mind.

Most insidious are the provisions governing legal material. They suggest the other regulations are mere smokescreens designed to divert attention from the state's principle objective: the stripping of jailhouse lawyers. For the legal materials sections of the PA regulations govern *all* prisoners in the hole, whether for disciplinary or administrative reasons.

There is solid support, from scholars and statistical analysis, for the notion that jailhouse lawyers are the targets of the new rules. In 1991, one of the most exhaustive studies to date on the targets of the prison disciplinary system were released. The report, titled *The Myth of Humane Imprisonment*, [*Editors Note: the report is still available for $5.00 from the Prisoner Rights Union, P.O. Box 1019, Sacramento, CA. 95812-1019.*] found there is a statistical hierarchy of who receives the harshest disciplinary sanctions from prison officials. Authored by criminologist Mark S. Hamm, Dr. Corey Weinstein, Therese Coupez and Francis Freidman, it presents tables reflecting the most frequently disciplined of prisoners:

Group	%of Sample
Jailhouse Lawyers	60.8
Blacks	48.5
Mental Handicaps	37.9
Gang Members	31.0
Political Prisoners	29.8
Hispanics	27.0
Homosexuals	26.6
Whites	22.2
AIDS Patients	19.9
Physical Handicaps	18.7
Asians	5.1

In accounts supporting the statistical data, the authors wrote, "...respondents observed that guards and adminis-

trators had a standard practice of singling out jailhouse lawyers for discipline in retaliation for challenging the status quo."

While the data supports the widely held notion that blacks are often targets of severe sanctions, that jailhouse lawyers are the *most* sanctioned is striking. For jailhouse lawyers—men and women self trained in law and legal procedure—are among the most studious (in law, at least) in the prison and therein lies the rub.

The evidence suggests, and the new regulations clearly supports the notion, that prison administrators don't want studious, well read prisoners. Rather, they prefer inmates who are obedient, quiet and dumb. Why else would a prison expressly forbid a person from expanding their learning through correspondence courses or educational programs?

It would seem that any institution daring to use the term "corrections" would *require* all of its charges to participate in educational programs, for how else is one "corrected?" Yet, disciplinary prisoners are forbidden from the one resource designed to moderate behavior and enhance self esteem—education.

For them, many of whom are illiterate, books are deemed "contraband" and educational courses are proscribed.

In that one regard, more than any other, lies the solution to the often bewildering conundrum labeled as "corrections." The state raises its narrow institutional interests—that of "control" by keeping people stupid—over an interest that is intensely human: the right for all beings to grow in wisdom, insight and knowledge, for their own sakes as well as their unique contribution to the fund of human knowledge.

This intentional degradation of the soul by the state, which allows a being to degenerate or vegetate yet forbids one from mental expansion, is the most sure indictment available of a system that creates, rather than corrects, the most fundamental evil in existence—that of ignorance.

Freedom for Puerto Rican POWs

Today the United States government holds in its custody many Puerto Rican women and men, criminalizing them for having fought for the independence of their country. Like George Washington in his day, they are anti-colonial combatants. Washington's contemporary, Thomas Paine, defended in *Common Sense* the choice to take up arms against the British colonizer: "It is the violence which is done and threatened to our persons; the destruction of our property by an armed force; the invasion of our country by fire and sword, which conscientiously qualifies the use of arms..." They are like Nelson Mandela in our day, who told the court when faced with life in prison for his role in a conspiracy to use force to overthrow the apartheid regime,

"A time comes in the life of any nation, where there remains only two choices—submit or fight. That time has now come to South Africa. We shall not submit and we have no choice but to hit back by all means in our power in defense of our people, our future, our freedom."

And also like Mandela, they are serving the equivalent of life in prison.

Most of the prisoners are convicted of seditious conspiracy and related charges—conspiring to use force against the lawful authority of the United States against Puerto Rico. While US courts determined that they violated domestic law, other forums and tribunals have determined that they acted pursuant to international law, which provides that colonialism is a crime, and which protects and encourages the legitimate fight to eradicate colonialism. Others are convicted of conspiring to take US government insured money for use in their struggle for self-determination.

The United States claims a proud history as a defender of human rights across the globe. The continued incarceration of these men and women stands in stark contrast to this claimed role. Furthermore:

Ten of the prisoners are serving terms of 55 to 90 years, sentences which are 19 times longer than the average sentence for all offenses in the year they were sentenced.

Their disproportionate sentences punish them for who they are—anti-colonial combatants—rather than for what they did.

Most have already served 10 and 13 years in prison, far longer than the average person convicted of murder serves;

They acted out of political motivation, not for personal gain.

Many have been held in the most maximum security prisons under restrictive conditions which even Amnesty International has condemned.

Finally, US history offers rich precedent for their release. US Presidents have throughout history exercised the constitutional power of pardon to release people who acted or conspired to act against the government, including Confederate soldiers who had taken up arms in the Civil War and were convicted of treason, socialists convicted of organizing armed resistance to conscription for World War I, and Puerto Rican Nationalists who fired on Blair House in 1950 and on the US Congress in 1954.

People in Puerto Rico and the United States have established Ofensiva 92, a campaign to win the prisoners' immediate and unconditional release. The campaign is reaching new people and forums, including the New York City Council, which recently passed a resolution asking the Secretary General of the United Nations to call on the US President to release the prisoners. In July of this year, Ofensiva will submit to the US President a formal application for their release. In support of this application, the campaign is collecting letters directed to President Bill Clinton, as well as resolutions from organizations.

Add your voice to the thousands who have already expressed their opinion to the President. Let him know that it was not enough for the US to pressure South Africa to release Nelson Mandela, but that the US must apply such standards within its own borders and its own Mandelas. Send your letters to: Ofensiva 92, Apartado Postal

Continued on next page...

20190, Rio Piedras, Puerto Rico 00928, and the campaign will forward them to the president. Join us!

Solidarity With Revolutionary Prisoners

We are a committee formed by two Italian political groups (Il Bollettino and Solidarieta Proletaria), which have been focusing on revolutionary political prisoners for a number of years, since the early eighties.

Our activity of support for political prisoners not disassociated from the class struggle develops on several levels and goes from the publication (through a bimonthly magazine and a quarterly information paper) of documents, political analysis written by the prisoners to various material activities (medical treatment, sending of money, books, magazines, etc.) and political support such as counterinformation meetings, solidarity festivals, struggles supporting the demands of prisoners, etc.

We believe that this solidarity activity is of great importance and, while not being the primary task of communists, does belong to the communist and revolutionary movement because political prisoners are a part, the product and the living memory of this movement.

Throughout the years we were interested not only in the political prisoners of our country but also, as far as possible, in the conditions and struggles of political prisoners in other countries, especially of the European countries due to the greater homogeneity of the political struggles and of the counter insurgency policies in this area.

After collective debate and reflection carried out over the last few months, we have thought it important to give more relief to the activity of support, information and political solidarity towards the communist and revolutionary prisoners from Western Europe within our publications and activities. That is why we are writing to you: to ask for your help and your cooperation to build permanent relations of mutual exchange of news, information and publications aimed at creating a network of all the solidarity groups for solidarity with revolutionary political prisoners in Western Europe. If you are interested, please write to us as soon as possible so we can start this project. Write: Solidarieta Proletaria, C.P. 17030, 20130 Milan, Italy.

[*Editor's Note: The comrades at SP print and distribute PLN to about 70 readers in Europe and the Middle East. Most of these readers are revolutionary prisoners or prisoner solidarity groups. There is a great need for an international association of class struggle prisoners, both to raise awareness around this issue and to break the wall of silence around political prisoners in the imperialist countries. The bourgeois "human rights" groups, like Amnesty International, do not recognize or acknowledge revolutionary prisoners in the imperialist countries. It is up to the working class movements to support and defend their captured combatants. We will have more articles in this in future issues of PLN.*]

Prisoners As Workers

Court Defines Applicability of Fair Labor Standards Act

By Ed Mead

Many years have passed since the era of liberal court rulings in the field of prisoners' rights. These ground-breaking decisions were handed down in the wake of a budding prisoners' movement, a movement led by the likes of George Jackson and the Attica Brothers, a movement that challenged the very legitimacy of capitalist rule. The forward progress made on the legal front during those years took place in direct proportion to the strength of that movement. When we were advancing, when our political strength was growing, then the courts were more favorably disposed toward the legal positions being advanced by prisoners.

Before the advent of the prisoners' struggle of the late 1960s and early 1970s the status of prisoner rights litigation in the Ninth Circuit and elsewhere within the federal appeals courts was discouraging. One of the more widely known of the early prisoner rights litigators to set a modern day standard of reality was the so called Birdman of Alcatraz, Robert Stroud. In the Ninth Circuit *Stroud v. Swope*, 187 F.2d 850 (9 Cir. 1951), stood for the proposition that prisoners have no rights the state is bound to respect. The ruling established an iron wall between prisoners and the constitution. This wall became widely known as the "hands off" doctrine. This doctrine is where we came from, and, now that our movement is all but dead, it is the oblivion to which the courts are seeking to return us.

History develops in spirals, repeating itself for sure but always on higher and higher levels. The courts can try to send our struggle for human rights back into the era of the 1950s, but we have clearly come too far for that. Yet every time we manage to litigate ourselves to the crux of what this whole exercise is really all about the courts slap us in our collective face with the thirteenth amendment. This is just what happened in connection with the Fair Labor Standards Act (FLSA). The court ruled that we are but slaves of the state who are not entitled to statutory protection accorded all other workers.

An *en banc* Ninth Circuit addressed the questions of whether the Fair Labor Standards Act applies to prisoners, and whether prisoners in Arizona correctional facilities who have worked for state prison industries are "employees" who are entitled to be paid minimum wages under the statute. These questions were considered *en banc* to resolve a conflict between that court's rulings in *Gilbreath v. Cutter Biological Inc.*, 931 F.2d 1320 (CA 9, 1991), and the contrary holding in *Hale v. Arizona*, 967 F.2d 1356 (CA 9, 1992). In *Gilbreath*, the panel held that prisoners working within the prison for a private plasma treatment center were not "employees" of the company that ran the lab. The panel in *Hale*, on the other hand, ruled that prisoners working for a state prison industries program and for a prisoner-owned enterprise within that program were "employees" of the state under the FLSA.

Under the FLSA, "employ" includes to "suffer or permit to work." The U.S. Supreme Court has instructed courts to

interpret the term "employ" in the FLSA expansively. It has also held that, as a general rule, whether there is an employment relationship under the FLSA is tested by economic reality rather than technical concepts. The Ninth Circuit elaborated on the economic reality test in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (CA 9, 1983), where the court mandated that courts must consider the totality of the circumstances of the relationship, including whether the alleged employer has the power to hire and fire the employees, determines the rate and method of payment, and maintains employment records.

Ignoring long-touted principles of fairness and justice, not to mention its own earlier rulings, the *en banc* court of appeals held that the FLSA does not apply to prisoners. "Regardless of how the *Bonnette* factors balance," the court said, "we... hold that they are not a useful framework in the case of prisoners who work for a prison-structured program...." How does the court get around applying even minimal legal protections to prisoner-workers? It does so by taking us back to the days of *Stroud* and the other pro-slavery rulings of that era. "Convicted criminals," the court continued, "... are not protected by the Thirteenth Amendment against involuntary servitude." As you know, the thirteenth amendment abolished slavery for everyone except those convicted of a crime.

By denying prisoners the right to be paid the minimum wage they would be entitled to under the FLSA, the court undermined one of the purposes of the act. Congress was concerned about the unfair competition substandard wages would cause in interstate commerce. Aside from the slavery issue the state continues to uphold, and the other principles such as fairness and justice, the bottom line is that the court ignores its own laws. If "being forced to work means being subject to" work, as the dissent points out, then in forcing prisoners to work the state "suffers" them to do so. By the very terms of the FLSA, this means the state "employs" them. Moreover, the dissenters continue, although the FLSA says nothing about the relationship between prisons and prisoners, "the statute's over-arching concern with unfair competition from cheap labor weighs in favor of interpreting the FLSA as covering prison workers who compete with workers in the private sector."

To overcome the adverse impact of rulings that would seek to send us back to yesterday's legal concepts we will need to build a strong prisoners' movement. And since our struggle to extend democracy will necessarily require the elimination of the thirteenth amendment, and the overthrow of the limitations contained in the whole economic tilt of the bourgeois constitution, this movement must be explicitly anti-racist, anti-sexist, and anti-capitalist. Until we start making significant progress on this front we will continue to be nothing but slaves of the state, both in practice and in law. See, *Hale v. Arizona*, ___ F.2d ___ (CA 9, 1993), 61 LW 2684 (5-18-93).

Prisoners as Workers in Washington State

New Law Will Increase Exploitation

By Ed Mead

The 1993 session of the Washington State Legislature has passed a new law that will dramatically increase the number of prisoners working in this state's institutional industries. Governor Lowry should have signed Senate Bill 5989 into law by the time you read this. In addition to increasing the number of industrial workers, the new legislation authorizes the state to take more than 50 percent of the wages earned by inmate workers.

The bill requires that state agencies purchase goods and services produced in whole or in part by industrial work programs operated by the Department of Corrections, provided that such prisoner-produced products meet the requirements of the purchasing agency or department, are equal to or better quality than can be obtained elsewhere, and that the price is not higher than can be found in the private sector.

The act requires that the secretary of corrections deduct from the gross wages of all prisoners working in either class I or class II industries, or any prisoner earning more than the state minimum wage, the following amounts:

1. Ten percent to the crime victims' compensation account.
2. Ten percent to a personal savings account until the amount of $950 is reached, after which this deduction will be used to contribute to the cost of corrections.
3. Thirty percent to the department of correction to contribute to the cost of incarceration (this amount will jump to 40% once the inmate's savings account reaches $950).

Understanding that prisoners will most likely not want to work under such rip-off wages, the law provides a clause authorizing DOC to develop incentive programs that will offer inmates "benefits and amenities paid for only from wages earned while working in correctional industries work programs." In other words, those currently working in industries will pay for the bribes the government will use to entice others to become slaves of the state.

This law is to take effect on June 30, 1994. And each year from then on, until the year 2000, the Department of Corrections is required by law to increase the number of prisoners working in prison industries until it has achieved a net growth of at least 1,500 industrial workers.

The new law has a provision mandating thata newly created industries board of directors offer inmates "meaningful employment, work experience, and training in vocations that are specifically designed to reduce recidivism and thereby enhance public safety by providing opportunities for legitimate means of livelihood upon their release from custody." While that sounds nice, in a following section the act mandates that the board shall invest available funds in correctional industries enterprises and meaningful work programs "that *minimize the impact on in-state jobs and businesses*." How can the state provide prisoners with "a

Continued on bottom of next page...

Editorial Comments

By Ed Mead

RESIST GRANT: In my last editorial comments I waxed eloquent on the increased cost of our current publishing format and the need for us to obtain new readers in order to sustain the cost of these increased pages. More paying subscribers, I pointed out, would ensure that we were able to bring printing costs down. That's because the more copies we have made the cheaper the printing is. Well, I am not yet sure how that appeal is going to work out, but we do have one bit of very good news. Resist gave us an $800 grant, an amount that should tide us over the worst part of this format transition. We send our thanks and a tip of the hat to the folks at Resist for their help.

VOLUNTEERS NEEDED: Readers in the Seattle area, or those on the inside who have loved ones residing in Seattle, are urged to assist our outside volunteers in the production of *PLN*. This task consists of two phases: The folding and stapling that takes place before the regular mailing at the Capitol Hill home of a volunteer. And the general mailing that consists of adding address labels and sorting the newsletters. Each of these once-a-month jobs takes about 1½ hours. Anyone who can make either the folding or the mailing should drop Paul or me a line and we will put you in touch with the folks doing the mailing. This is a small slice of your monthly time, and you needn't even make it every month. Please help us out if there is any way you can. The ongoing production of the newsletter depends on a good base of outside volunteers.

STUDY GROUPS: About eight month ago I asked readers if they would be interested in participating in a political, philosophical, and legal study group. The response was underwhelming. Accordingly, in a subsequent issue I reported this fact and said I was scrapping the idea due to a lack of interest. Well, that brought on a spat of letters from interested subscribers asking me to reconsider that decision. We will get the course going. Those interested in participating should write me a letter saying so. We will get the project off the ground within the next couple of months. This is not going to be a free law book program, but rather a lot of hard study primarily in the areas of philosophy, politics and law. Don't get involved unless you are willing to give it a good try. We will provide you with the necessary books and course materials when the time comes.

BACK ISSUES: We have had quite a few people asking us for back issues of the newsletter. Most of these come from law firms or law libraries. We don't have many sets of back issues, and getting more copies run is a real problem. Still, we can provide copies of back issues at a rate of $35.00 per year for the years of 1990, 1991, 1992 and 1993 (volumes I, II, III, and IV). This may be something your institutional law library will be interested in obtaining for their collection.

BIG MAILING: Last month we mailed out an extra thousand plus free sample copies of the newsletter and a subscription form to prison law libraries at every maximum, medium, and minimum security prison in the United States. That means your prison law library has one of these. This would be a good time to urge your law librarian (or the person responsible for supervising the law library) to subscribe to *PLN*. Please make it your task for tomorrow to see if you can get your law library to subscribe at our institutional rate of $35.00 per year. It is the money generated by these institutional subscribers that pays for the 38 percent of the newsletter subscriptions we give away to locked down and death row readers.

CONCLUSION: That about wraps it up for another month. Again, if you are an outside person in the Seattle area, I urge you to attend our monthly mailings. The time involved is small, the people you will be working with are wonderful, and the political impact of your time will be considerable. Prisoners with loved ones in the area should make them familiar with the paper and ask them to become involved in the production process. Continue sending us articles. You can see that we are using what you write, and that the newsletter is considerably improved as a result of it. We are especially interested in "How To" pieces on various aspects of prisoner rights litigation. Enough for today, precious reader. Be sure to pass this on to a comrade when you are done with it.

Continued from previous page

legitimate means of livelihood upon their release" while at the same time training them to do work that will "minimize the impact on in-state jobs and businesses"? You can readily guess which of these conflicting priorities will win out.

In addition to paying for the cost of their confinement, the money paid to DOC by prison industrial workers will also pay the cost of developing and implementing the growing correctional industries programs. Moreover, when the secretary of corrections wants to, he can further increase the level of deductions taken from an inmate worker's wages in order to pay family support.

A handy example of how this law will effect those currently working in industries is that of a friend of mine who currently earns $4.25 an hour and nets $2.62 an hour. Under this act his earning would go down to only $1.77 per hour. Although it looks as if wages will be going up under the new act, the truth is that the actual amount earned will go down by approximately a third. The appropriate response to this latest attack should be the same as that used by workers around the world to defend themselves—the union!

In the early 1970s I organized the Washington State Prisoners Labor Union. In 1974 I stood outside this very prison, where 97 percent of the prisoners were card-carrying union members. Prisoners were on strike demanding that the union be their sole bargaining agent. I was leading a demonstration in their support on the other side of the walls, handing out leaflets and hollering over a bullhorn. We lost that struggle. But seeds that did not take root in 1974 may well grow in 1994. As Comrade Bill Dunne regularly reminds us, the future holds promise.

The Telephone Game

Nearly a year and a half after a scandal about purchasing involving the North Carolina Coin Tel Company has passed. The grand jury has finally indicted two people in the illegal activities.

The indictments handed down against D.R. Hursey and Michael A. Weaver focus on a $1.2 million dollar contract for maintenance of prison pay phones used by prisoners.

Hursey is the correction department's former director of departmental services, which controlled all purchasing for state prisons. Weaver was an AT&T account executive and one of the owners of Coin Tel Inc., the company that received the maintenance contract.

Auditors said the purchasing irregularities cost tax payers $7.2 million in wasted or misspent funds.

Former Corrections Secretary Aaron Johnson resigned last year in the wake of the purchasing problems. Six other officials either resigned, retired or were transferred to other state jobs.

According to the indictments handed down by the Wake County grand jury, Hursey and Weaver engaged in a bid rigging conspiracy between January, 1989, and September, 1992, that involved contracts for the purchase of telephones and telephone services. These included the collection of coins from prison pay phones, prison pay phone maintenance and management of phones located in the departments facilities.

One of the contracts was awarded to Coin Tel by Hursey without a formal bidding procedure. On that same day, Hursey's wife quit her job with the Corrections Department. She later went to work for a company owned by Coin Tel's officers.

The indictments said that the vendors involved in the contracts were AT&T, M.A. Weaver and Associates and Coin Tel.

Other indictments include:

- The Corrections Department paid Coin Tel $1,093 for maintenance and services before the phones had actually been installed.
- The Corrections Department paid Coin Tel $15,633 for services on pay phones that were never installed.
- Coin Tel collected fees to provide maintenance services on prison pay phones even though the department had already paid the company $82,245 for maintenance on the same phones during the same time period.

With all the fraud taking place within the scope of the Corrections Department and questionable activity by the Operator Service Providers it's not hard to understand why it costs so much more for prisoners to call home or why prisoners are being ridiculed by the operators. Prisoners are being punished for the activities involved in the system and within the carrier companies.

If this type of fraud is taking place in the North Carolina system it would only be logical to assume that this type of fraud and criminal activity is to be found in other systems in other states.

Readers from many states have questioned the contracts between the correctional system, and the carriers involved in the prisoner telephone OPS. Perhaps it is time to also question the fraud that may be involved in the contracted services. This type of criminal activity within the system and the contracted services is the reason prisoner pay phone calls are higher than outside service calls. It is high time we got the criminals out of the management offices and into cells where they belong.

Source: *Creations*, P.O. Box 2403, Burlington, NC. 27216-2403.

CEML Update

[*CEML is the Committee to End the Marion Lockdown, an anti-control unit group. PLN recently received the following letter from CEML concerning their activities.*]

This has been the busiest of times for CEML. First, work continues to prevent the opening of the new control unit at Florence, Colorado, or at least to alter its destructive impact. The bulk of the work is being done by the Coalition to Shut Down Control Units, a statewide organization in Colorado (they also publish an excellent newsletter, *Shut Them Down*, available for $10.00 from the Rocky Mountain Peace Center, P.O. Box 1156, Boulder, CO 80306). CEML is continuing to press this work as well as trying to find sympathetic audiences within the new administration. Additionally, we along with the folks in Colorado are continuing our petition campaign. We now have over 4,000 signatures but would like to double that number. Please write for copies of the petition.

Second, our work continues to combat the control unit prison in nearby Westville, IN. As if the brutality of that prison were not enough, the comparatively tiny state is apparently now planning to build a second control unit since the first has not succeeded in stifling dissent there.

Third, since the coming October will mark the tenth anniversary of the lockdown at Marion, we are trying to construct a fall conference that is suitable for the event. In this context, we are in touch with several prominent speakers. We will tell you more of the details as they become available.

Fourth, we continue our battle against the state of Illinois in its plans to build a control unit prison. Thus far, the proposal has been made by Gov. Jim Edgar's Task Force but Edgar has not yet been able to find the money for such a project. There is evidence that our work has played a part in keeping Edgar from building this prison.

As a result of all this activity, we must once again appeal to you for financial assistance. We know that many of you give generously. We apologize for asking again but we simply cannot proceed otherwise. Already we have cut back. For example, we have not published *Walkin' Steel* recently due to a lack of funds. Meanwhile expenses continue to mount. We spent over $300 producing literature that we provided to the governor's task force. The upcoming program and demonstration will also generate expenses. So please help if you can. CEML, P.O. Box 578172, Chicago, IL 60657-8172, (312) 235-0070.

Letters From Readers

Grievance Appeals Necessary

Being incarcerated now for over nine years between the federal BOP and the state of Alaska, I have found that many prisoners who file grievances do not follow up on them. Many get "pissed off" and go with that attitude when initially filing grievances against their keepers. When the grievance is denied they do not appeal it to the next highest level.

The error in this approach is that it does not get information about the problem out of the institution. All joints will try their best to retain their wrong-doings within their own walls. One must at least appeal a grievance to the next step and further if possible. If enough wrong-doing information gets to regional or state capitol offices, the higher ups will think there is a problem and maybe correct it.

If a prisoner was done wrong and gets no adequate relief, most states prisoners can appeal their grievances, and even their disciplinaries into their own state court system. It's a civil matter which could be found in the state's "Rules of Administrative Procedure" or "Administrative Code." All state have them. Along with the codes, many states have additional instructions on how to litigate *pro se* appeals in their "Rules of Appellate Procedure."

All it will cost you is postage to litigate. Indigency can be expressed in *a forma pauperis* application. You can even petition the court for the appointment of counsel. I would suggest you follow the outline set fourth in the *Prisoners Self-help Litigation Manual.* I think obtaining a judgement or out-of-court settlement would be faster in state rather than federal court.

Even though you're taking a state agency (DOC) into a state court, there are a lot of mitigators that could be toward you when you stay with it. That's the whole key—stay with it. Litigation is like a slot machine; it has its ups and downs, but the more you play it the better chances you have to get that jackpot.

Jack Leck II
Spring Creak Corr. Cntr.

News From Florida

It seems that the governor of this state [*Florida*] is trying to pass a 25¢ tax on every pack of cigarettes to raise money for the construction 21,000 additional prison beds to keep the violent offenders behind bars longer and, if possible, not to let them out ever again.

The governor has been hemming and hawing about the fact that there will be a gridlock and the prison system will run out of prisoners to release early due to the mandatory and habitual statutes they have been sentenced under, yet it was the governor and the legislature that passed both of these statutes when they were getting tough on crime in this state.

The governor has called the legislature back into special session to fix this so called gridlock problem by creating a bill or bills to fund the construction of the prison beds the governor wants. Yet the governor never called for any prison beds in the last couple of years after passing the habitual and minimum mandatory statutes. The word so far is that the legislature is about to compromise and allow the funding of 10,000 prison beds due to the finding of almost 270 million dollars in the state coffers that the governor's staff knew about yet forgot to tell the governor until the end of the regular session where the legislature passed a bill funding the construction of 7,000 beds which the governor promptly vetoed.

No matter how many prison beds the legislature funds for construction, the problem of gridlock will still exist in the short run because you cannot build prison beds and get them on line in a matter of months. Well, yes you can if you give the job to a firm noted for its shoddy construction practices, then the prisons can be put up and fall down within a few years after they are built.

M.C., Clearwater, FL

FLA Death Penalty Games

I'm in the midst of challenging the reappointment of a guy named Spalding to the Capital Collateral Representative (CCR) post of Florida (that's the state funded agency that handles collateral appeals for indigent capital/condemned prisoners). I'm still on direct appeal, but I feel that I have standing as a prospective client, not to mention the sure standing of those who are actually represented by CCR, especially because his post is statutorily created and he's my attorney in waiting so to speak. Anyway, this character (who just so happens to be pro death penalty) made a deal with the Governor's office in late 1990 to abide by an unpromulgated one year timetable for filing 3.850 (ineffective assistance of counsel) appeals in exchange for more funding and no warrants being signed in that one year; he's forced his staff to abide by this since that time and forced out anyone who opposed it (by law we have two years to file). He never informed death row, never offered a counter proposal of his own on our behalf, nor did he inquire of death row if we had a viable counter proposal to offer.

In any event, I've gathered signatures from 2/3 of the men on this wing (a lot of them are scared to sign) and have petitioned the Public Defenders Association (they submitted his name with three others to the Governor without consulting us, so I've threatened a class action if they don't withdraw his name from consideration); the governor, who nominates one of the four names submitted to him by the PDA and then sends it to the Senate for confirmation; and the Florida state Senate because they have the last say in the matter and I doubt the governor will withdraw his pliable candidate. I've also written to Florida Supreme Court, Justice Overton, who chairs the Overton Commission that was the starting point of this inquiry as to what could be done to improve things and lower costs, etc., informing him that I have a viable counter proposal to make that does not require abolishing the death penalty, will unclog the courts of capital

cases and would require absolutely no tax increases to fund it and our rights will be protected.

Now we're about to do a media blitz and we're organizing supporters and getting them to sign a petition I wrote up from churches, etc., demanding that we at least be heard. This will go to the court itself from Tampa, West Palm Beach and Jacksonville. I'll keep you up to date on this as it unfolds.

F.V. Starke, FL

Ed Needs Out

I read with great delight the editorial comments by Ed Mead [*May 1993*]. I am happy that he has come to the conclusion that enough is enough. Like you, I do not think much of those [POWs] who merely promote themselves under the color of being "political." However, this does not mean one should not struggle for release in a principled, non-collaborationary manner. Given that Ed has been a comrade who has pressed forward in the struggle around prisoners' rights and justice, it is particularly fitting and just to struggle for his release.

Now to see if the ever vengeful state can regain a modicum of reason to suspend its pathological need for vengeance and deal with the material reality of punishment based on political beliefs.

Marilyn Buck
Anti-imperialist political prisoner

Likes New Format

The new format of the *PLN* is a quantum leap into the big time of radical publications. It is the best prisoner newsletter that I am aware of, and gives the *California Prisoner* more than a run for the money. The real kicker is that it is mostly written by people behind bars, where the *California Prisoner* is mostly produced on the streets. The frosting on the cake is that the *PLN* has its socialist leanings. A big "Bravo" to you guys!

Once a week we have a jailhouse lawyer's convention in the library, and of the five who were there last night all were of the opinion that the new format was the cat's meow. The consensus on the article about Ed's situation was that it was well done; everyone wishes him the best on his media blitz.

R.P., McNeil Island, WA

MI Phone Rip Off

I have read the article which appeared in *PLN* (Vol. 4, number 4) by Paul Wright about the prison telephone system. I was amazed to learn that the Washington DOC telephone contract states that the commission checks are sent to each institution and made payable to the Inmate Welfare Fund. That is *not* the case in Michigan.

The Michigan DOC keeps" all commissions paid by the telephone companies in spite of our protests. The Inmate Benefit Fund does not receive a single penny. We are currently litigating the matter and we hope to be successful.

B.K. Jackson, MI.

International News

Prison Privatization in England

The British government's "privatization program" for prisons and prison service is proceeding fast. After the contracting out of the Wolds prison in Humberside to Group 4 security, Blakehurst, a new prison in Worcestshire, has been tendered out to UK Detention Services. Meanwhile bids have just closed for the contract to run the rebuilt Strangeways prison. A new prison in Doncaster, South Yorkshire, will be contracted out later this year. In February parliament voted to extend the original plan which allowed only for new prisons to be "privatized," to mean that the running of existing prisons could be contracted out.

As usual, the private companies competing for the market in private prisons are linked very close to the Conservative Party and to ex-civil servants, ex top cops and ex army chiefs. For instance, Norman Fowler, an original member of the government team that recommended the privatization program after the 1986 inspection tour of US private prisons, is a non-executive director of Group 4 Remand Services. Ex metro police commissioner Peter Imbert is a non executive director of Securicor, who are to bid for the new Doncaster prison. UK Detention Services is partly owned by McAlpine and Son: Lord McAlpine is a former Tory party treasurer. And so it goes on.

This is of course unsurprising, but is a case of the ruling class in the shape of large corporations and their civil servant/parliament representatives feathering their own nests.

But what will it all mean for prisoners? Initially there will no doubt be a flow of government money into the schemes to make it look like it is working well, but already at the Wolds prison there have been several protests about the food and conditions. This is of course no different to the prison service as it stands. Some prisoners are in favor of giving private prisons a try, as (a) it can only be given a chance in the face of the shitty system that exists; and (b) hopefully it will break some of the power of the prison officers association which can enforce its own reactionary and repressive behavior in prisons while it has a stranglehold on running prisons. There is little to say that private security firms will be any better, however. It is worth pointing out that the government will be able to blame private companies for conditions, scandals, etc., while keeping a measure of control over events.

News from the Wolds suggests that Group 4 have lost control somewhat there, which on the one hand means more freedom to move for cons (but does also mean some of the nastier prisoners have a free hand to exert their own control). One ominous aspect is the use of cons as cheap labor in US private prisons. In Louisville, Kentucky, prisoners are working in a packing plant as scab labor to break an ongoing strike by the workers there. This isn't an isolated event. If private prisons are set up on a large scale in Britain then they could be used to do the same here. As it stands the

Continued on next page...

overall practical effect of contracting out prisons is uncertain.

Meanwhile it's not all sweetness and light for the private prison companies. Group 4 Court Services, a branch of the Group 4 company, won the contract to deliver prisoners to court in the East Midlands area and started operating in April of 1993. Within the first week four prisoners had already escaped from their custody, including one who they just allowed to go free after a misunderstanding. Let's hope they do as crap a job at keeping people in their prisons.

Source: *Contraflow*

German Geriatric Prison

Germany may have the most humanitarian prison in existence today. [***Editors note:*** *They may also have the most inhumane prison as well, the notorious Stammheim prison is where the sensory deprivation isolation now in widespread use across the world was first developed in the mid-70's against German political prisoners.*] Although you must be over 50 years of age to do time in this prison, it is a prison with a heart and does rehabilitate prisoners. Virtually no repeat offenders from its populace have come back into the prison system. The prison is located at Singen, Germany. Conditions for getting into this prison are predictably tough. Prisoners must be over 50, must be socially acceptable and not be dangerous. It is not a retirement home but arguably some people might think so. There are no cells only rooms where each prisoner has his own key. There are no locked doors in the prison itself. The prisoners are free to go anywhere they please. They may walk down the plant lined corridors to the gymnasium, library or courtyard with lawn and fish pond.

Each prisoner has his own seven square meter room, usually decorated with plants and pictures of family. He is responsible for keeping his room clean and doing his own laundry. If married, he is allowed outside of the prison for four hours each month to go to town and be with his wife. He can also take 20 days holiday per year and can go into town to the swimming pool and bowling alley each month accompanied by two warders in plain clothes.

As in other prisons, the inmates, whose ages range from 50 to 80, work in the workshop which in Singen is light, airy and brand new. Work ends at 4 PM after which the prisoners are free to do whatever they like. They can choose between painting classes, gymnastics and conferences. A score of volunteers regularly come to organize social evenings and entice the less active prisoners away from the television screens in their rooms.

Even better provisions for social readjustment are demonstrated by the prison administration in permitting the resident social worker to take inmates once a month to a pub in town for a lesson in "social training." They talk about all sorts of things in this normal environment while drinking good German beer. Since alcohol is banned inside the prison, this helps the inmates to gradually get used to drinking alcohol again, says the social worker.

The social worker also prepares the prisoners for their day of release. It comes early for all since they don't abuse the privileges of the prison for they know they have something to lose if they screw up—hard time in a "normal prison." Good behavior also gets them considerable time off their original sentence. On average, inmates spend about 4 years before release, although there are a few sentenced to life imprisonment (but who will get out on parole with good behavior). To date, only once a "crazy" man has ever tried to escape. According to the warden of Konstanz prison, their goal is to offer more humane conditions of detention to prisoners, who because of their age might not survive long in normal jails. *Expat World* says hats off to the system of justice that allows such humane treatment of prisoners. It's obvious that the nature of most prison systems today in the Western World, and in particular the USA, are not working. It may be time to change tactics in our incarceration of non violent offenders.

Source: *Expat World*

The Collapse of the Brazilian Penal System

By Jayme Brenner

[***Editors Note:*** *This article was translated by Paul Wright from* ***El Dia Latinoamericano****, a regional bi-weekly published in Mexico. While most American readers of* ***PLN*** *are familiar with the prison crisis facing the US, the fact is that virtually all of the capitalist countries are in the midst of a severe prison crisis as a result of relying on prisons as a means of social control for their populations. The result of neo liberal, "free trade" policies with the resulting impoverishment of large sectors of the world's population has created an explosion in prison systems around the world. The US prison crisis is just part of the puzzle.*]

The report issued in May, 1993, by Amnesty International concerning the massacre of 111 detainees in the Carandiru prison in Sao Paulo uncovers a new chapter in the history of police violence in Brazil.

Beyond the considerable damage to the electoral pretensions of the Governor of Sao Paulo, Luis Antonio Fluery, who sought to present himself as a "centrist alternative" in the 1994 presidential elections, the situation around these events reveal a true collapse of the Brazilian penal system.

Sao Paulo.- In May, 1993, Amnesty International released a report on the massacre of 111 detainees in the Carandiru prison in Sao Paulo in October of 1992 [*PLN, Vol. 4, No. 1*]. The report claimed Luis Antonio Fluery, the Governor of the State of Sao Paulo, and Pedro Franco de Campos, his Secretary of Public Security, were responsible for the massacre by delivering command of the prison to the Militarized Police (MP), which is known for its brutality and responsibility for the majority of the violent deaths in Sao Paulo.

On October 2, 1992, police armed with machine guns occupied Pavilion 9 of the prison, the biggest one in Latin America where some 7,200 prisoners were held. Supposedly they were to put down a riot. In the days that followed it was learned that the operation consisted of a true cold blooded massacre.

Amnesty International also accused the government of Sao Paulo of concealing the dimensions of the tragedy. The massacre took place the day before the primary in municipal elections. Fluery Filho had his own candidate for the position of mayor of Sao Paulo and it is known that the first official reports talked about eight dead, as the true number could have altered the voting results. Up until now no soldier, police official or government representative has been punished. [*Editors Note: A large number of police and military officials were recently charged with crimes resulting from the massacre. PLN, Vol. 4, No. 5*].

The tragedy of the collapse of the prison system goes beyond the borders of Carandiru. According to the Ministry of Justice, Brazil has over 127,000 prisoners held in conditions of overcrowding in the prisons; the deficit in the system is for 75,000 beds. Seventy five percent of the prisoners are being held for robbery or theft, a class of crime that is becoming all the more common due to the sharpening economic crisis.

"It is absurd to put someone who steals in prison and who, in contact with murderers and rapists, will be transformed into a true criminal," lawyer Alberto Silva Franco told *El Dia Latinoamericano*. Franco is a member of the commission currently studying the reform of the Brazilian penal code which was last revised in the 1940s. Franco cites the case of Marcos Sergio Ferreira who escaped from a police station in Sao Paulo where he was serving a prison sentence of 514 years for stealing a pair of slippers, a watch and the equivalent of ten dollars in currency.

The overcrowding causes a daily average of three escape attempts from prisons across Brazil. In Sao Paulo alone, 567 prisoners have escaped in the first four months of 1993. In 1992 there were 1,230 escapes in the state of Sao Paulo.

The biggest problem is not in the big prisons but in the police stations in the biggest cities of the country: Sao Paulo, Rio de Janeiro and Belo Horizonte. These were built as provisional jails but with the overcrowding in the prisons they became "xadrezes" (prisons) on a permanent basis.

In Sao Paulo the jails have a capacity for 2,500 people but currently hold more than 6,000. One of the most dramatic examples occurs in the police station located in the very center of Sao Paulo. There, 163 prisoners live (or try to) in an area of 180 square meters. The cells are full and 49 of the prisoners have to sleep in the patio, which is open to allow sunshine and fresh air to enter. When it rains these 49 "prisoners without a roof", as Rubens Ferrari the police commissioner calls them, have to sleep by tying themselves to the bars of the cells which results in the near suffocation of those sleeping inside the cells.

"The real drama occurs on visiting days, when there are more than 300 people in the patio," says the prisoners' leader Alcaldes Tadeu Francisco, a strong, stocky black serving a sentence for pick-pocketing. "Our only alternative is to build a ladder." Each one of the prisoners talks with his family on one "floor" of the bars, he explains.

In the prisons' cells, eight people alternate to sleep on each bunk. Three of the prisoners suffer from AIDS and are literally rotting on the floor because there is no room for them in the prison hospital. Even under these conditions the harsh prison "ethics" guarantee that each prisoner will be able to have sexual relations when their woman visits them: the cellmates improvise a curtain and try to minimize violations of this poor privacy, even though love is produced in front of 300 people.

Another extreme case of overpopulation and inadequate prison installations, is in the police delegation of Guarulhos, a city of 800,000 inhabitants on the outskirts of Sao Paulo. The prison has a capacity for 72 prisoners but holds 360. The commissioner of police himself has requested that the building be condemned because underneath its floors there are 31 tunnels dug by the prisoners.

After each escape cement is poured into the entrance and exit of each tunnel. But the prisoners open new holes, taking advantage of parts of the old tunnels. Two years ago six prisoners escaped by urinating on the wall until the cement was weakened.

"We have carried out three escape atempts a day" says Ubirajara Lourenco, a drug trafficking "soldier" who is a prisoner in Sao Paulo and who cannot even walk well due to a poorly cured sexual disease.

According to the Ministry of Justice, 88 per cent of the prisoners in Brazil are illiterate or semi-literate, the majority of them are black. Prison employees receive a median salary of 90 to 200 dollars a month, which is an incentive for corruption.

In Guaralhos a group of prisoners escaped last year using a pistol provided by a policeman. The collapse of the state produces a constant reduction in the prison budgets and the growing violence widens popular sympathy for the adoption of the death penalty.

As long as there are no alternatives in sight to resolve the problems of Brazilian prisons, the prison commissioners count on a new possibility to avoid escapes or riots: to vigorously search the cells, sometimes daily, of all the prisons and jails.

On visiting days families can no longer bring plates of closed pasta, like ravioli or capeletti, due to the frequency of which contraband such as marijuana and cocaine were found in their interior. With greater frequency drugs are the currency used in the corruption of employees. Cans of soda pop are prohibited because they can be made into knives. But this does not represent a real solution. The detainees in the prisons of Belo Horizonte have threatened to renew the sinister "lottery of death." In 1985 the prisoners of the city killed 11 fellow detainees to protest overcrowding.

Since then little has changed.

Guatemalan Prison Riot

Some 1,000 prisoners of Pavocinto penitentiary near Guatemala City who took over the prison grounds on April 11, 1993, allowed authorities back in on April 13, 1993, after a 30 hour standoff. In exchange, the government promised that living conditions in the prison would be improved. Nine prisoners escaped, five were killed and 25 people were wounded during the riots. During negotiations with Guatemala's vice minister of the interior, the national police chief and the national penitentiary system director, the prisoners made about 12 demands which included a stop to physical abuse and corruption in the prison. The prisoners accused prison employees of selling food which was brought to them by their friends and family [*Editors Note: the practice in most Latin American countries is that prisoners families must feed and clothe the prisoners, the government does not do so.*], and demanded guarantees that the food would reach them. Responding to another prisoner demand, officials promised to investigate the death of an inmate who was beaten by guards seeking information on the escape of nine other prisoners on April 10, 1993.

Weekly News Update

Death Squads and Prison Protests in Ecuador

According to a note sent to the police in Guayaquil, Ecuador, on April 12, 1993, a death squad called the "Anti-Crime Clean Up Squad" has claimed responsibility for the death of six common criminals and promised the shooting of another seven. The six victims had criminal records and were shot and their bodies dumped outside Guayaquil. In the right hand of one of the victims was a prison release form, in an apparent message about the illegal releases from jail of numerous criminals. Six police commissioners in Quito (the capital of Ecuador) have been indicted for the illegal imprisonment of people to extort money from them, and for the illegal release of convicted criminals.

About 600 prisoners of Quito's jail taped their lips shut in a hunger strike on April 12, 1993, to protest lengthy delays in legal processes. Last March, prisoners held a hunger strike for the same reasons. In the meantime, political disagreements have been keeping Ecuador's 16 high courts from resuming their regular activities. Recent attempts to depoliticize the justice system have so far been unsuccessful.

Weekly News Update

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Working to Extend Democracy to All

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Documents "Filed" When Delivered to Prison Officials

In two separate cases from the fifth and eleventh circuits, the appeals courts have adopted the Supreme Court's ruling that documents are considered filed in court when they are delivered to prison officials for mailing by *pro se* prisoner litigants.

Lawrence Thompson is a Texas state prisoner. He filed suit under § 1983 and the case was referred to a magistrate. The magistrate recommended that the suit be dismissed as frivolous and informed Thompson that he had ten days in which to file any objections to the recommendation with the presiding judge.

Thompson requested, and received, an extension of time for filing the objections. He mailed his objections in an envelope provided by the court on November 18, 1991, two days before the deadline. On December 4, 1991, prison officials returned the envelope citing his failure to put his name and DOC number on the envelope. Thompson remailed the objections and they were received by the court on December 12, 1991, 22 days past the deadline. The court adopted the magistrates report and dismissed the suit holding his objections were not timely.

The court of appeals for the fifth circuit vacated and remanded. The appeals court adopted the supreme court's reasoning in *Houston v. Lack*, 487 US 266, 108 S.Ct. 2379 (1988), and held that "*pro se* prisoners filing written objections to a magistrate's report and recommendation pursuant to Fed.R.Civ.P. 72(b) are subject to the same conditions and limitations of confinement as a prisoner filing a notice of appeal." Because the time to file objections to magistrate's reports is substantially shorter than that in which to file a notice of appeal (10 days versus 30), the court found no basis upon which to distinguish this case from *Houston*.

"We therefore hold that, for purposes of FRCP 72(b), a *pro se* prisoner's written objections to a magistrate's report and recommendation must be deemed filed and served at the moment they are forwarded to prison officials for delivery to the district court. This ruling, however, does not relieve a prisoner of the responsibility of doing all that he or she can reasonably do to ensure that documents are received by the clerk of the court in a timely manner... Failure to stamp or properly address outgoing mail or to follow *reasonable* prison regulations governing prisoner mail does not constitute compliance with this standard."

The appeals court vacated the order dismissing the suit and remanded it for a determination of timeliness. If the court finds that Thompson delivered his objections to prison officials on or before Nov. 20, 1991, the court should consider them in deciding to accept, modify or reject the magistrate's recommendation. If Thompson did not file his objections in a timely manner the district court can disregard them and reinstate its judgement.

The eleventh circuit court of appeals reached a similar decision in a companion case reported in the same volume. The case involves a consolidated appeal by state and federal prisoners in separate states. The primary issue the court decided in this case was whether or not *pro se* prisoners' pleadings are considered filed when they are delivered to prison officials for mailing. They held they are.

The court gave an extensive discussion of the policy reasons behind adopting this rule and cites cases from every circuit that has considered this question. The court held that "...*Houston* places the burden of proof for the *pro se* prisoner's date of delivering his document to be filed in court on the prison authorities, who have the ability to establish the correct date through their logs."

The court held these considerations apply equally to federal as well as state prisoners and to § 1983 cases as well as Federal Tort Claims cases. Both cases were reversed and remanded to the respective district courts. See: *Thompson v. Rasberry*, 993 F.2d 513 (5th Cir. 1993); *Garvey v. Vaughn*, 993 F.2d 776 (11th Cir. 1993).

Access To Courts: Standing To Assert Right

This access to the courts case was filed by the Prisoners' Legal Association (PLA), a sanctioned organization of seven jailhouse lawyers operating inside the East Jersey State Prison. The PLA claimed they were harassed because of their litigation efforts performed in behalf of other prisoners. The case was heard before the U.S. district court on a motion for summary judgment filed by the defendant prison officials. The court ruled in favor of the prisoners.

Judge Sarokin started his opinion by saying: "What distinguishes our society from most others is the continued right of access to the judicial process afforded even to those who have been charged, tried and convicted of a crime. In order to make such access meaningful," the judge continued, "prisoners need not only the physical tools to create and submit their complaints and petitions for relief, but

Continued on next page...

frequently due to their own deficiencies in education or language skills, they also need the intellectual tools possessed by others."

As noted above, the PLA prisoners charged they were the victims of harassment and retaliation because of their prison sanctioned efforts on behalf of other prisoners. The defendants filed a motion for summary judgment pursuant to Federal Rules of Civil Procedure 56(b), asserting first that the PLA lacked the necessary standing to bring such a lawsuit, and, secondly, that the facts did not give rise to a claim under 42 U.S.C. § 1983. According to allegations contained in the complaint, the defendant officers harassed each of the plaintiffs in retaliation for their role in the filing of lawsuits against prison officials. This harassment took such forms as verbal abuse, searching their legal materials, and denying them meals.

Preliminary to reaching any determination was the need to establish the issue of standing. Specifically, do jailhouse lawyers have standing to assert the right to access to the courts of those they assist? The law is that while prisoners needing legal help have a right to the assistance of other prisoners in the preparation of legal pleadings, those assisting them do not have any enforceable right to do so.

In this case the court dealt with the standing question by pointing out that the PLA members were trained by the prison to serve as paralegals, that their legal activities were prison sanctioned, that they helped the prison to fulfill its obligations under *Bounds v. Smith*, 430 U.S. 817 (1977), and that without their assistance the prison population would be deprived of their constitutionally guaranteed right of access to the courts. It was for this narrow reason, and only at this preliminary stage of the proceedings, that the court found in favor of the PLA paralegals on the standing question. Accordingly, the court reasoned, if the legal assistance provided by the PLA is constitutionally necessary for the state to meet is *Bounds* obligations, then it follows that the defendants' alleged harassment of the paralegals gives rise to a constitutional claim.

Since the question of the existence of a constitutional violation was so closely related to standing, the court in effect ruled on the standing issue as it decided that a violation had taken place. The court denied the defendant's motion for summary judgment and appointed counsel to assist the plaintiff prisoners. See: *Prisoners' Legal Association v. Roberson*, 822 F.Supp. 185 (D.N.J. 1993).

Censoring Legal Mail States Claim

Henry Lavado was a federal prisoner whose legal mail from attorneys, the ACLU and various state and federal law enforcement agencies was opened and read outside of his presence. Some of his legal mail was opened and read in his presence. Lavado filed suit under *Bivens* claiming that the opening of his legal mail outside of his presence, and reading of his legal mail, violated his first, fourth, fifth and sixth amendment rights. He sought money damages, injunctive and declaratory relief. Lavado was released from prison but continued to prosecute this action. The district court dismissed the claims for money damages, holding that the defendants were entitled to qualified immunity. The court dismissed the remaining claims for equitable relief by holding Lavado's release from prison had mooted those claims. The court of appeals for the sixth circuit affirmed in part, reversed in part and remanded.

The appeals court reviewed the district court's denial of Lavado's motions for the appointment of counsel and to compel discovery and affirmed the ruling by finding no abuse of discretion because indigent litigants are not entitled to counsel and discovery was not needed in the case.

The court gave an extensive review of the law of qualified immunity and how it relates to prisoner mail. In affirming the dismissal, on qualified immunity grounds, of several of Lavado's claims, the court went a long ways to accommodate prison officials. It upheld dismissal of claims where the BOP opened legal mail outside of Lavado's presence when the mail was clearly marked as legal mail and was plainly from attorneys, because it did not bear the verbatim statement required by BOP rules. The court upheld the opening and reading of a letter from the ACLU that was properly marked in accordance with BOP rules because it did not contain an attorney's name on the outside of the envelope. The lengths the court was willing to go in affirming dismissal of Lavado's claims became apparent when it upheld the opening of a package sent to Lavado. "The outside of the package contained the marking 'Special Mail-open only in the presence of the inmate,' identified the sender, and identified the sender as an attorney as required by 28 CFR § 540.19(b). The Bureau of Prisons regulations, however, do

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not clearly indicate that *packages* so marked are to be treated the same as *envelopes* so marked."

However, the appeals court did reverse the dismissal of Lavado's claim concerning BOP guards opening and reading his legal mail in his presence, and also when Lavado protested this the guard then gave him his business card stating Lavado would need it to "spell his name right when [plaintiff] sued."

The court held that while there may not have been clearly established law that prisoner's legal mail could not be opened outside the prisoners presence, there is well established case law holding that opening/reading prisoner's mail in an "arbitrary" or "capricious" fashion does violate prisoner's first amendment rights. The court states: "While we do not contend here that violations of the Bureau of Prisons regulations, per se, are violations of the aforementioned clearly established constitutional rights, we believe that the allegations of blatant disregard for established regulations give rise to an inference of arbitrary or capricious action." The court noted that the guard giving Lavado his business card after reading his mail supported such an inference. The court remanded the case back to the lower court for a trial to determine if the opening and reading of Lavado's legal mail was arbitrary and capricious. See: *Lavado v. Keohane*, 992 F.2d 601 (6th Cir. 1993).

Bar on Access to Court Records Struck Down

The Massachusetts legislature passed the Criminal Offender Record Information System (CORI) which changed the conditions by which the public gained access to court records in the state criminal justice system. The state courts used this law to prohibit unrestricted access to the alphabetical indices of the parties in criminal proceedings, which is used to track cases.

Several news organizations filed suit in federal court claiming that this ban on public access violated the first amendment. The district court agreed and ruled in their favor.

The court gave a detailed historical and legal review of the fact that public access to records submitted in criminal court proceedings has been a right since before the founding of the United States. This right is protected by the first amendment. The analysis to be employed in determining whether to afford public access to materials generated by criminal proceedings is 1) an inquiry into the historic availability of the materials; and 2) whether such availability plays a significant positive role in the functioning of the particular process in question.

The purpose of this inquiry is to ensure the objectives of the statute are sufficiently important, the means chosen by the state must effectively promote the statute's objectives and the state must not infringe on the first amendment more than necessary to promote these objectives.

Considering these factors the court found CORI to be unconstitutional. Anyone litigating this type of claim will benefit from the court's extensive discussion of the historic right of public access to the courts and criminal justice. See: *Globe Newspaper Co. v. Fenton*, 819 F. Supp 89 (DC Mass 1993).

Pro Se Detainee Has Access Rights

A detainee held in the Metropolitan Correctional Center (MCC) at San Diego, named Gust Janis, was awaiting trial on federal drug manufacturing and possession charges. Janis was also involved in a number of other criminal and civil cases, telling the court he has some sixty-seven civil actions pending. Janis filed a motion, in connection with his criminal case, claiming that his right of access to the courts was effectively denied by various shortcoming in the legal research facilities at the jail (MCC).

The threshold question was whether the right of access to the courts includes general civil litigation, as the issue had not been squarely addressed in the ninth circuit. The district court adopted the reasoning of the fifth and eleventh circuits, holding that the constitutional right of access to the courts includes access for general civil legal matters. This was an issue because the MCC law library did not provide materials for civil research.

The court ordered that Janis be given access to state law on various subjects (because of the detainers on him from several states), that selected civil law books be provided to him, that the federal criminal law in the jail's law library be expanded and updated, and that Janis be allowed to have some of his personal law books in his cell so long as the hard covers were removed. The district judge also increased Janis' law library time from six to ten hours per week, and ordered that he be accorded reasonable photocopying facilities. The court refused to stop the government from listening to phone calls to Janis' attorney, and his request for access to a typewriter was denied as being moot.

Since this case was initiated in connection with a criminal defendant's right to defend himself, rather than under 42 U.S.C. § 1983, the benefits ordered apply only to Janis, and then only until he is either convicted or acquitted and thus no longer a pre-trial detainee. See: *United States v. Janis*, 820 F.Supp. 512 (S.D. Cal. 1993).

Court Access for Spanish Speakers

This is a § 1983 access to the courts case filed by a county jail prisoner who was not conversant in the English language. The plaintiff, Acevedo, claimed that his jailers denied him meaningful access to the courts by failing to maintain an adequate law library and to provide a Spanish-speaking legal assistant. Acevedo sought both monetary and injunctive relief, but he was removed from the jail before the court heard the motion for summary judgment filed by the defendant jailers.

The U.S. district court judge evaluated the standards by which a motion for summary judgment and the law applicable in access to the courts cases. The court said, "... for

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prisoners who cannot read or understand English, the constitutional right of access to the courts cannot be determined solely by the number of volumes in, or size of, a law library." While granting summary judgment in many aspects of this case, it was not granted on the access issue. "It would be wholly contrary to the spirit and purpose of *Bounds* to conclude that the provision of a law library afforded that protection for prisoners who cannot understand the language in which books are written" "Clearly," the court continued, "*Bounds* requires some form of assistance to those for whom even the most comprehensive law library is of no avail."

Since Acevedo was moved from the jail before this case was heard, his request for injunctive relief was denied. The case will continue on to trial on the question of damages. See: *Acevedo v. Forcinito*, 820 F.Supp. (D.N.J. 1993).

Ninth Circuit Reverses Powell Decision

By Robert Powell

To understand just what has happened in this case one must first understand Washington state law. At the time of my conviction a person who was found guilty of Murder in the First Degree was either sentenced to death or life imprisonment. If sentenced to life imprisonment the parole board set a term of confinement and in most cases they acquiesced to RCW 9.95.115.

RCW 9.95.115 requires that a mandatory minimum term of twenty consecutive years, less good time, be served before the parole board could parole a person sentenced to life, provided that the superintendent issued a letter (certificate) stating that the convicted person has been confined for twenty years, less good time, and has done the work assigned in a faithful and diligent manner.

Well, a new law was passed in 1989 allowing the parole board to set terms that complied with the Sentencing Reform Act (SRA) of 1984 and eliminated the need for the superintendent's letter. The parole board (now called the Indeterminate Sentence Review Board) went right to work and re-set all the minimum terms of murderers at terms longer than the twenty years as required by the old law. In my case the term was set at 31 years, 8 months. In other words, the board will not consider me for parole until I serve the additional eleven years, 8 months, less good time. The addition of the eleven years before parole consideration is what we went to court for.

I filed in the Supreme Court of Washington State raising three issues: due process, equal protection and *ex post facto*. I lost the case in the Washington Supreme Court with a five to four split of the court. The court concluded I am in a better situation and therefore there is no *ex post facto* violation, since the new law no longer requires the superintendent's letter he no longer exercises discretion over me and I will be guaranteed a parole hearing. They held the law works to my advantage. However, the court was careful to note that the parole board only has to consider me for parole, but does not have to release me. A habeas petition was then filed in the United States District Court in Seattle.

The district court reversed the Washington State Supreme Court. The judge Thomas Zilly found that the removal of parole consideration for eleven years violated the United States Constitution. The court opined that although the superintendent may never issue the letter, or even if the superintendent did issue the letter, the board could deny a parole hearing because of their discretion but the opportunity still remained that I might obtain the letter and a parole hearing under the old laws before eleven years had elapsed. Since there was the chance that I might be paroled during the eleven years added to the minimum term, the new law violated the *ex post facto* clause of the constitution. The state then appealed to the ninth circuit court of appeals.

The ninth circuit's Judge Poole has said in dissent: "I cannot agree that this new scheme, designed to postpone for 30 years any review of Powell's parole eligibility, does not represent a disadvantage over the former law, which would have granted Powell a parole review in 20 years if his behavior satisfied the Superintendent. If the state's adoption of a 'safety hatch' provision such as section 9.95.052—creating the possibility, however remote, that the harsher effects of a new law could be eliminated in certain cases—were enough to shield a law from *ex post facto* review and invalidation, then *any* law could be made immune from ex post facto review and invalidation. I do not believe the guarantees of the *ex post facto* clause are so easily circumvented. Subtle *ex post facto* violations are no more permissible than overt ones." *Collins v. Youngblood*, 497 US 37, 46 (1990).

From the majority's opinion: "In its reasoning for finding an *ex post facto* violation, the district court found that the guarantee that Powell will be considered for parole at 30 years minus good time is also a guarantee that he cannot be considered for parole before then. The district court concluded that Powell has lost an opportunity for release before the end of the discretionary minimum term. However, this does not take into account Wash. Rev.Code Ann. § 9.95.052, entitled "Redetermination and refixing of minimum term of confinement," which states:

"At any time after the board ... has determined the minimum term of confinement of any person subject to confinement in a state correctional institution, the board may request the superintendent of such correctional institution to conduct full review of such person's prospects for rehabilitation and report to the board the facts of such review and the resulting findings. Upon the basis of such report and such other-information and investigation that the board deems appropriate, the board may redetermine and refix such convicted person's minimum term of confinement whether the term was set by the board or the court."

Remember now that under the old law I could be considered for parole after serving twenty years less good time and under the new law I can be considered for parole after serving thirty-one years, eight months, but under both laws I am only to be considered for parole and the board never has to release me. Needless to say, I am in awe of the court's

opinion and will never understand how the court somehow believes that the parole board will use the above law to reduce a term of imprisonment when the board has fought so hard to have the new, harsher, law passed. See: *Powell v. Ducharme*, ___ F.2d ___ (9th Cir. 1993).

NY Re-Examines Tough Drug Laws

Former New York governor Nelson Rockefeller decided to launch a "get tough on crime" approach to dealing with that state's drug users and dealers. In 1973 Rockefeller had the state legislature pass a "lock 'em up and throw away the key" approach to drug crimes. Twenty years later, law enforcement and corrections officials, state lawmakers and anti-drug advocates say they would prefer the Rockefeller laws would die and give birth to new drug rules which better fit the times.

"The Rockefeller drug laws have lost any deterrent effect they might once have had," state Correctional Commissioner Thomas Coughlin recently testified before a state Assembly committee looking at the impact of the two decade-old drug policy. Coughlin said the rules need to be revamped because they do nothing but dump drug abusers into the state's overcrowded prison system.

Rockefeller's tough drug laws are forcing law enforcement agencies to "lock up the wrong people, for the wrong reasons," Coughlin said. They also force the state's judges to mete out the same punishments to drug abusers as to violent offenders such a rapists, he added. "The identical treatment of those two offenses, which have such a disproportionate impact on their victims, borders on the ridiculous," Coughlin testified. "It tells you that our legal sense of priorities is totally out of whack."

About 45 percent of New York's 64,000 prisoners are drug offenders. The argument being put forward is that the state should use its resources to treat drug addicts, rather than imprison them. It should eliminate mandatory sentences and give judges the discretion over prison, probation or drug treatment. And it should recognize the difference between a dealer and an addict.

The federal system is currently in the process of making the same mistake New York is finally waking up from. After destroying countless lives they too will eventually discover that treatment and jobs are workable, cheaper, easier to do, and far more effective than mere punishment. What they will not do, however, is examine the social causes or roots of drug addiction. That would of course require an examination of the nature of capitalism, and perhaps even discussion of a possible alternative. While the system is willing to cycle back and forth between the ineffective liberal (treatment) and conservative (punishment) approaches to addiction, there is no way it will address the individual alienation giving rise to so many of the criminal justice problems society is experiencing today.

Florida Builds More Prisons

The Florida state legislature in late May approved a plan to spend $215 million on prison construction and also voted to overhaul state sentencing guidelines.

The expansion package, which passed during a special legislative session called by Gov. Lawton Chiles, will add 10,524 beds to the prison system over the next five years. 8,510 prison beds, 1,511 alternative program beds and about 500 beds for juvenile prisoners. It includes funding for four new prisons as well as dorms added to existing prisons, work camps and drug treatment centers.

About 3,500 prison beds and all the alternative beds are expected to be in operation within a year, heading off a potential early release crisis. Prison officials had feared that by October they would have to begin including violent offenders in their early release program to meet statutory bed capacity. Florida currently houses 50,000 prisoners.

The legislators also agreed to raise the prison population cap from 97.5 percent of the system's capacity to 99 percent before early release programs take effect. This will allow for the use of an additional 792 beds.

The new sentencing legislation narrows the definition of habitual offenders, a step intended to increase the number of drug offenders eligible for early release credits, and eliminates many of the mandatory sentences for crimes ranging from assault on an elderly person to planting a hoax bomb. The bill, which takes effect January 1, 1994, also provides longer terms for violent offenders.

To fund the plan, the legislature will use a $167 million windfall from overestimates in the demand for welfare and medicaid services. The money averted the need for a 25 cents a pack increase in the state cigarette tax.

Source: *Corrections Today*

ACLU Reaches Accord with Hawaii in Prison Case

A consent agreement was reached in July in a nine-year old Hawaii prison law suit, it was announced by Alvin J. Bronstein, executive director of the National Prison Project of the American Civil Liberties Union of Washington, D.C., Governor John Waihee, and state public safety director George Sumner. The accord establishes a timetable for the dismissal of a 1984 lawsuit brought on behalf of prisoners by the National Prison Project and the local ACLU over unconstitutional conditions at two Hawaii prisons.

The new agreement will continue the process of improving conditions at the Oahu Community Correctional Center (OCCC) and the Women's Community Correctional Center (WCCC).

At a mid-July press conference in Honolulu, Bronstein said, "There is a delicious irony in announcing the agreement on this particular date. Nine years ago this week I first toured the WCCC and OCCC. I have never seen conditions as bad as I did that day. There were people sleeping on the floor, in corridors, in classrooms. It was so crowded there was no way to keep it clean."

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At that time, the population at the women's prison was 300% of capacity, meaning there were three inmates for every one prison bed. "WCCC was the most crowded prison in the country," said Bronstein.

Both parties agree that conditions have improved since the lawsuit was filed in 1984. The ACLU had asserted that conditions at both facilities were inhumane and violated minimal constitutional standards. An innovative consent decree resulted, which established three panels of experts to develop plans for improvement and to monitor the state's progress.

The lawsuit spurred the legislature to appropriate funds for a new women's facility, to implement alternatives to prison time, and to pass legislation for the release of non-violent offenders in times of severe overcrowding.

The new agreement: (1) Limits the number of prisoners housed in particular areas and in any one cell. (2) Provides for permanent population caps at both WCCC and OCCC which will be enforced by Hawaii state courts rather than the federal court. (3) Dissolves the three expert panels in favor of two monitors who will determine whether the state is in compliance. At the end of 10 months time, if the monitors agree that the state is in compliance, officials may petition the court for dismissal of the lawsuit.

Carl Varady, legal director for the Hawaii ACLU, said of the agreement, "Once the state is in compliance, we hope the permanent population controls in the new agreement will assure that the state will not slip backward toward the serious and sometimes life-threatening conditions that once existed in its prisons."

Due Process Required Before Hole Time

A county jail prisoner in Lubbock, Texas, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 against his captors. He alleged jailers violated his right to due process by placing him in lockdown without a hearing. The prisoner's crime was to ignore guards who ordered him to close his cell door (he told them it was their job to close the doors). The prisoner was charged with disobeying orders and engaging in disruptive conduct. He was thereupon placed in lockdown, where he remained for nearly a month.

The district court dismissed the prisoner's complaint as being legally frivolous under 28 U.S.C. § 1915(d), on the basis of the pleadings alone. The prisoner appealed and the court of appeals reversed the lower court. "Our remand is prompted," the appeals court said, "because it is unclear from [the prisoner's] pleadings whether the lockdown was for punitive reasons and whether the lockdown entailed solitary confinement." The fifth circuit had previously held that the use of punitive isolation without affording due process is unacceptable and violates the fourteenth amendment.

The remand in this case was not due to any specific legal principle, though, as much as it was to further develop the prisoner's factual and legal contention, including whether jail regulations created a liberty interest in remaining in the jail's general population. See: *Mitchell v. Sheriff Dept., Lubbock County, Texas*, 995 F.2d 60 (5th Cir. 1993).

Elements of Jail RICO Suit Explained

Billy Joe Ashe is a Montgomery County, Texas, prisoner. He filed suit claiming that in retaliation for filing suit against members of the Sheriff's Department he and his co-plaintiff, and their prisoner witnesses, were subjected to a frightening pattern of physical violence and brutality by members of the Sheriff's Department. The acts were committed pursuant to the sheriff's policy of using physical violence to punish uncooperative prisoners.

The plaintiffs filed suit under section 1983 for violation of their constitutional rights, and under the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) and (d). The district court granted the defendant's motion for summary judgement and dismissed the suit. The court of appeals for the fifth circuit affirmed in part, reversed in part and remanded the case for further proceedings.

The court gave a detailed explanation of the burden borne by the moving party in a summary judgement motion. It held that in this case the defendants had completely failed to show there were no material issues of fact in dispute nor that they were entitled to judgement as a matter of law. The district court also failed to set out any reasons for granting summary judgement and did not provide any findings of fact or conclusions of law to support its ruling.

The appeals court held that dismissal of the RICO claim was warranted for failure to state a claim under Rule 12(b)(6). This was due to plaintiff's failure to correctly plead the elements of a RICO violation. "A viable claim under section 1962(c) requires proof of '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.' *Sedima S.P.R.L. v. Imrey Co.*, 473 US 479, 496, 105 S.Ct. 3275, 3285 (1985)... Both in their complaint and during oral argument the plaintiffs alleged that the 'enterprise' involved in this case was the Montgomery County Sheriff's Department. Yet the Montgomery County Sheriff's Department and Montgomery County are the one and the same. It is well established that under section 1962(c) the RICO defendant must be a *separate and distinct entity* from the enterprise. *In Re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993), *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 583 (5th Cir. 1992). A defendant simply cannot employ or associate with itself. The same would be true for the plaintiff's section 1962(d) claim since that claim would depend upon proof that Montgomery County conspired to violate section 1962(c). Just as Montgomery County cannot conspire to employ or associate with itself, it cannot conspire with itself. On this ground alone it is clear that summary judgement was appropriate for the plaintiff's RICO claims."

The appeals court ruled that the lower court had erred in dismissing the § 1983 claims. Because the defendants had not met their burden of proof, they were not entitled to summary judgement. The plaintiff's claims were sufficient to plead facts which, if true, would entitle them to relief. See: *Ashe v. Corely*, 992 F.2d 540 (5th Cir. 1993).

Evidence Must Support Disciplinary Charge

Lloyd Brown is a District of Columbia prisoner held at the Lorton prison in Virginia. Brown was infracted for throwing a fermented solution of milk, feces and urine in a guard's face. He was charged with assault and destruction of property, and three other offenses. The disciplinary board found him guilty of all five charges and sentenced him to 14 days in segregation.

Brown filed suit under § 1983 claiming that the assault and destruction of property charges violated his right to due process because the charges were not supported by any evidence presented at the disciplinary hearing. He also claimed the board violated his due process rights by not providing him with an adequate written statement setting forth the reasons it relied upon in reaching its decision. The district court agreed with Brown.

The court held, as an initial matter, that Lorton prison disciplinary rules create a due process liberty interest that is enforceable in federal court under § 1983. Noting that the *only* evidence presented to the disciplinary board was the guard's infraction report, the court held "nothing in the report serves as evidence that the plaintiff committed the offenses of assault or damage to property."

Because the guilt finding was unsupported by any evidence at the hearing the court granted Brown's motion for summary judgement and ordered the infractions expunged from his record and the case dismissed. Brown had not sought money damages. See: *Brown v. District of Columbia*, 822 F.Supp. 17 (DC DC 1993).

Destruction of Evidence Allows Adverse Inference

Jerry McCrary-El is a Missouri state prisoner. He filed suit under § 1983 claiming that prison guards used excessive force in moving him to the back of his cell, within the prison's segregation unit, to place a cellmate in his cell. After a trial a jury found in favor of the defendants. McCrary-El appealed several of the trial court's evidentiary rulings. The court of appeals for the eighth circuit affirmed the jury verdict.

The appeals court upheld the lower court's ruling admitting into evidence a videotape of a second cell move (the issue before the jury was whether excessive force was used in the first cell move on the same day). The court held the video was relevant to any injuries McCrary-El had sustained in the first cell move and was thus admissible.

The court also affirmed the admission into evidence of past conduct violation reports concerning alleged misconduct by McCrary-El. The court held this was relevant to the defendants state of mind because "the question of excessiveness of force,.. cannot be assessed in a vacuum,.. it will vary from circumstance to circumstance" because not all prisoners require the same amount of force. The court recognized the danger of unfair prejudice to the plaintiff but held that such rulings were entrusted to the trial judge's discretion and would not be reversed on appeal unless it was apparent the trial court had abused its discretion.

Prison officials videotaped the first cell move in which McCrary-El claims excessive force was used but they failed to produce the video for the jury to review at trial. McCrary-El submitted a jury instruction, taken verbatim from *Devitt and Blackmars Federal Jury Practice and Instructions*, § 72.16, which stated: "If a party fails to produce evidence which is under his control and reasonably available to him and not reasonably available to the adverse party, then you may infer that the evidence is unfavorable to the party who could have proffered it and did not."

Instead, the trial court gave an instruction that required a finding that the defendants had intentionally destroyed the videotape. The appeals court agreed with McCrary-El's argument "We believe that he was entitled to argue to the jury that the government still had the videotape and was refusing to produce it because it was damaging to its case. By refusing to give the instruction, the court took the government's side on the factual question of whether the government still had the relevant tape, a question that the jury was privileged to resolve against the government because it admitted that the tape once existed." The court went on to find that while this was error it was harmless error in light of the remaining evidence which supported the jury's verdict. See: *McCrary-El v. Shaw*, 992 F.2d 809 (8th Cir. 1993).

Prohibition of Beatings Well Established Law

Steven Hill was a jail prisoner in the Tazewell County, IL, jail. When ordered to leave his cell to clear it for another prisoner Hill questioned why he was being moved. William Shelander, a guard, responded by grabbing Hill's hair and shoulder, pulling him out of the cell, slamming his head and back into the metal bars of the cell across the hall and then proceeding to punch and kick him. Hill suffered injuries to his head, face, back and groin. He filed suit claiming that the beating violated his eighth amendment right to be free from cruel and unusual punishment. Shelander sought summary judgement on qualified immunity grounds. The district court concluded that the law was well established that such beatings were unlawful and denied the motion.

Shelander appealed and the court of appeals for the seventh circuit affirmed in part and dismissed part of the appeal for a lack of jurisdiction.

The appeals court gave an extensive, detailed discussion of the law of qualified immunity in general and as it applied to eighth amendment brutality claims. The court held that while immunity questions are generally objective questions of law to determine whether the right was clearly established at the time the incident in question occurred, in some cases the defendant's intent is also at issue to establish the constitutional violation. "Because Hill has thus asserted a constitutional claim requiring proof of intent, he must adduce specific factual support for his allegation of bad intent to survive a motion for summary judgement." The court ruled

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Hill had presented sufficient evidence by characterizing the incident as an unprovoked assault. Shelander denied this and claimed it was a necessary use of force to maintain discipline and order. Being unable to resolve this disputed issue of fact the court dismissed this portion of the appeal for lack of jurisdiction until it was resolved by a finder of fact. At that point, with the factual issues resolved, the immunity question could be addressed.

The court ruled that the law in eighth amendment cases is clearly established and not a new or unusual principle. "The test in eighth amendment excessive force cases has been well settled for a number of years: whether force was applied in a good faith effort to maintain or restore order and discipline or maliciously and sadistically for the very purpose of causing harm." Thus, if a jury finds in Hill's favor Shelander will not be protected by qualified immunity. The court rejected Shelander's argument, that the balancing process prevents the law from being established, by noting that such a rule would result in immunity findings in all excessive force claims against prison officials. See: *Hill v. Shelander*, 992 F.2d 714 (7th Cir. 1993).

'Right To Die' Rulings Grow

A quadriplegic prisoner and a woman imprisoned in a persistent vegetative state occasioned recent "right to die" rulings in two states.

The California Supreme Court ruled unanimously that a quadriplegic prisoner who is not terminally ill but who must be assisted by others to perform bodily functions such as eating may refuse the insertion of a feeding tube, even if he dies as a result. The doctrine of informed consent includes the right of a competent adult to choose non-treatment, the court said. *Thor v. Superior Court of Solano County*, CalifSupCt, No. SO26393, (7/26/93).

The court said the state has legitimate interests in preserving life, preventing suicide, protecting innocent third parties, and maintaining the integrity of the medical profession. But a survey of these interests yielded nothing of enough moment to overcome the prisoner's right to refuse unwanted treatment.

A prison doctor's fear that complying with the prisoner's wishes would lead to civil and criminal liability was groundless, the court said. A treatment or non-treatment decision made by a patient who has been properly informed of the possible consequences discharges the physician's duty to render care, the court explained.

Though the prison context often diminishes individual rights, the court said the state cannot override a prisoner's basic right to bodily integrity absent a threat to institutional security or public safety.

The court specifically disclaimed any reliance on "quality of life" concerns but took notice of the prisoner's heavy dependency on others in performing all bodily functions. The need to respect an individual's autonomy is particularly acute when physical disability impairs that individual's health and vitality, the court said.

Meanwhile, the Kentucky Supreme Court ruled that an authorized surrogate may exercise an incompetent patient's right to withdraw hydration and nutrition but only if such action corresponds to wishes expressed by the patient while competent. *DeGrella v. Elston*, KySupCt, No. 92-SC-756-TG, (7/15/93).

Kentucky's Living Will Act and Health Care Surrogate Act send "mixed messages" on these issues, the court said. Both statutes exclude nutrition and hydration procedures from the types of "life-prolonging treatment" that a competent adult can request withheld or withdrawn. On the other hand, both statutes explicitly purport to preserve common law rights, including those of self-determination and informed consent.

Hearsay evidence of a person's wishes prior to becoming incompetent is admissible under Kentucky evidence rules to show state of mind, the court said. When the wishes of the patient are known, a surrogate may act on them, it concluded. See: 62 *Law Week* 1018 (08/10/93).

Denial of Physical Therapy Shows Deliberate Indifference

Joel Durmer was a New Jersey state prisoner. Shortly before being imprisoned he suffered two strokes which left him weakened and partially paralyzed. His treating physician prescribed extensive physical and water therapy which he received until he entered the DOC's custody.

After entering the New Jersey state prison system Durmer informed the Mid-State Prison doctor, defendant O'Carroll, of his stroke and immediate need for physical therapy. O'Carroll did not reinstitute physical therapy but instead sent Durmer to be examined by doctors at the Trenton State Prison. Durmer was duly examined and those doctors also recommended physical therapy. Durmer never received any type of physical therapy. Over a one year period he saw various prison doctors but was never actually given the physical therapy because it is only an effective treatment for strokes within 12 to 18 months after the stroke occurs. By that time, more than 18 months had passed since Durmer had the strokes. Durmer filed suit under § 1983 claiming that the lack of physical therapy constituted deliberate indifference to his serious medical needs. The district court granted summary judgement to the defendants and dismissed the suit.

The court of appeals for the third circuit affirmed in part, reversed in part and remanded.

The appeals court ruled that a material issue of fact, precluding summary judgement, existed as to whether O'Carroll was deliberately indifferent to Durmer's medical needs. The court noted that a trier of fact might conclude that O'Carroll's sending Durmer to various doctors, none of whom ever recommended against physical therapy, was merely a pretext to avoid physical therapy. There was evidence in the record that physical therapy placed a considerable burden and expense on the New Jersey DOC and was therefore frowned upon throughout the system.

Under the third circuit standard of *Monmouth County Correctional Institution Inmates v. Lanzaro*, 834 F.2d 326 (3rd Cir. 1987), delaying medical treatment for non-medical reasons, prison officials preventing prisoners from receiving recommended treatment and an intentional refusal to provide medical care, all show deliberate indifference to prisoners serious medical needs in violation of the eighth amendment and are actionable under § 1983.

A trial was necessary in this case to determine if O'Carroll had been deliberately indifferent to Durmer's medical needs.

The appeals court affirmed dismissal of the claims against the prison warden and the DOC commissioner by ruling that because neither was a physician, their failure to respond to Durmer's complaints of not receiving adequate medical care did not show deliberate indifference because Durmer was already being treated by the prison doctor. See: *Durmer v. O'Carroll*, 991 F.2d 64 (3rd Cir. 1993).

No Qualified Immunity for Denial of Medical Care

George Cornelious was assaulted and badly beaten in Jefferson City, MO. While receiving treatment at a local hospital he was arrested due to an outstanding warrant. The treating doctor gave the arresting police a head injury monitoring sheet on which to chart and monitor his care. At 3:40 AM police delivered Cornelious to the Cole County jail.

The jail officer on duty called the jail administrator, Mark Robinett, to report that Cornelious had been brought to the jail with bruises and injuries. Two hours later Robinett was informed that Cornelious was sick and throwing up blood.

The next day Cornelious' mother, Vickie Foulks, came to the jail concerned about his slurred speech. She asked to see Cornelious or to be allowed to bring in a doctor, at her expense, to examine him. Jail officials denied both requests. After two days of laying semi-conscious in his jail cell Cornelious was taken to a hospital where it was discovered his brain had swollen to the point it couldn't be controlled with medication. Doctors operated on Cornelious, removing part of his brain which left him severely disabled.

Foulks filed suit against the responsible county and jail officials under § 1983 claiming that Cornelious had not been provided with adequate medical care. The defendants moved for summary judgement on qualified immunity grounds which the district court denied. The court of appeals for the eighth circuit affirmed the lower court ruling.

The appeals court noted that both prisoners and pre-trial detainees have a constitutional right to adequate medical care. The qualified immunity test requires an inquiry by the court to determine whether the plaintiff has asserted the violation of a constitutional right, whether the right allegedly violated was "clearly established," and third, to determine if, given the facts most favorable to the plaintiff, there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged actions violated that right.

The court ruled there was no question that Cornelious had satisfied the first two prongs of the qualified immunity test. "Foulks' allegations raise factual issues as to whether the defendants deliberately disregarded Cornelious' conditions and Foulks' request for medical care. The defendants have failed to show that their actions were objectively reasonable in light of clearly established law. The law was clearly established at the time of Cornelious' injury that if a reasonable official would have known that observation and treatment was necessary, the refusal to provide access to treatment would constitute deliberate indifference." See: *Foulks v. Cole County, MO.*, 991 F.2d 454 (8th Cir. 1993).

Right to Hot Water Clearly Established

Philip Mathews is an Illinois state prisoner. While he was confined in the segregation unit of the Stateville prison he was held in a cell without hot water for eleven months. His repeated oral and written requests that the hot water be fixed were ignored by prison officials. Mathews filed suit under § 1983 claiming that the denial of hot water, which prevented him from bathing, violated his eighth amendment rights.

Prison officials filed a motion to dismiss for failure to state a claim upon which relief could be granted under Rule 12 (b)(6) by arguing that prisoners have no right to hot water. They also sought summary judgement on qualified immunity grounds by arguing that if such a right did exist, it was not clearly established thus entitling the defendants to immunity for their actions.

The district court denied both motions. The court held that prisoners have a right to hot water in their cells. It denied the defendant's qualified immunity by holding Mathews had clearly shown a deliberate indifference to his needs by the "defendant's refusal to cure a readily remediable condition despite his numerous importunings to correct the problem, and what is perhaps more important is that *Wilson* announced (1) that *any* deprivation (including a single condition of confinement) meets that test if it denies 'the minimal civilized measure of life's necessities.'"

The court held that the eleven month refusal to fix the hot water faucet was punitive in nature. The court scheduled the case for trial. See: *Mathews v. Peters*, 818 F. Supp 224 (ND IL 1993).

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From the Editor

By Paul Wright

Welcome to another issue of *PLN*. Lately we have been sending out a lot of sample issues of *PLN* to encourage new subscribers. In August we sent an issue to every prison law library in the US. If our prison readers could encourage their respective libraries, prisoner clubs/groups, prison newspapers, etc., to subscribe to *PLN* at our institutional rate it would serve a twofold purpose; getting *PLN* to more people and raise our revenue base. We have display ads and subscription flyers available for anyone interested in helping us reach new subscribers. Part of the problem is that our target audience of prisoners and their loved ones is difficult to reach. So we will need your help in making inroads in this area.

We can also provide bulk copies of *PLN* to anyone interested; contact Ed or myself for information on this. On another note, if you have moved or otherwise changed your address please let us know. The post office charges us 35 cents for every issue it returns as "undeliverable," and it results in your missing an issue or two (assuming we are able to locate you). In cases where an issue is returned as "undeliverable" and there is no forwarding address, and you have not contacted us, we have no choice but to inactivate your subscription. *PLN* can follow you around the world, you just have to give us your current address.

Lately we have been getting an increased number of requests for legal assistance, law books, etc. So its time to repeat the periodic message that Ed and I do not do legal work, research or assistance for readers. *PLN* is our primary project and it consumes most of our time as it is. We are busy with it and doing local litigation (we recently filed suit over the fact that prison rules and policies are not available in Spanish to non English speaking prisoners). We're in the same boat you are, we too are prisoners and there is no shortage of civil rights abuses to be litigated locally. We provide *PLN* as a resource to help you help yourself.

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Several months ago we had a problem with our database where we "lost" some subscribers who had made donations to *PLN*. We have records showing who donated what but not their address. Since then we located all but one of the missing subscribers. If any *PLN* reader knows where Jorge Restrepo is can you either ask him to contact us with his current mailing address or send us his address so we can send him his subscription. Occasionally goof ups like this occur (the joys of computers) so if for any reason you aren't getting your subscription contact us as soon as possible so we can straighten it out.

We are quite happy with how things have been going with *PLN*. We do have a need for more outside volunteers in the Seattle area to help with the mailing of *PLN*, anyone interested should contact Ed or myself. Having seen quite a number of prison publications come and go over the years, it's good to see us being able to hang in there. Please continue sending us your articles, suggestions, comments and news.

Unless you are an indigent on death row or in a control unit your individual *PLN* subscription is pro rated at 75 cents an issue, which means we will send you *PLN* at that rate as long as your donation covers its cost. About two or three issues before your subscription runs out I send you a post card letting you know that you need to make a donation to keep getting *PLN*. It would help if folks renewed their subscriptions before then, which would save us the time and postage of sending you a reminder and also cut down on the chances of your missing any issues. Our concern is the time and energy that goes into this process, which can be better used on other things. Your assistance on this would be a big help. Some folks send us checks and earmark part of it for a subscription and part for a donation. What we do is we credit the entire amount to the individual's subscription because that way we can keep track of who has donated what to us over a period of time. The result is a $20 donation will receive 26 issues of *PLN*. You won't receive any reminders from us until you get within two or three issues of your sub ending. We rely on donations from our readers to continue publishing, so feel free to send us a donation whenever you can afford to do so.

Prison Slavery Upheld, Again

By Ed Mead

Prisoners in various Minnesota correctional facilities filed a class action suit in an effort to secure minimum wages for the work they performed in the many prison industries. The industries in question produce items such as furniture, truck and auto body products, mattresses, textiles, and notebooks; they also provide services such as data entry, assembly, market research, and printing to private companies with whom the state has contracts. The plaintiff prisoners also alleged that prison officials sell prison industry products in interstate commerce to governmental entities and to the private sector. The plaintiffs alleged that in 1991, total sales for prison industries exceeded $11 million, and forty percent of the sales were in the private sector.

The prisoners are paid between fifty and seventy-five cents per hour, and they may earn good time credits on those days they work. The substance of their complaint consisted of an alleged violation of their statutory and constitutional rights by the state's failure to pay them minimum or prevailing wages for the work performed in prison industries, and

by punishing prisoners who refuse to work in industries by depriving them of good time credits.

This case, like so many others filed on the prison employment issue, boils down to the thirteenth amendment's sanctioning of slavery for this segment of society. Regarding prisoners, the district judge said, "they are in fact engaged in involuntary servitude, not employment." "The law is clear," the court continued, "that prisoners may be required to work and that any compensation for their labor exists by the grace of the state." The bottom line, it was held, is that "the Thirteenth Amendment's exclusion of prisoner labor from the prohibition on involuntary servitude is a[n] ... economic reality..."

Title 18 U.S.C. § 1761, the Ashurst-Sumners Act, provides that: "[w]hoever knowingly transports in interstate commerce ... any goods, wares, or merchandise manufactured, produced, or mined, wholly or in part by convicts or prisoners ... shall be fined ... or imprisoned ... or both." Even though it was alleged that prisoners working in prison industries produced products sold in interstate commerce, the court ruled that prisoners could not enforce the provisions of the law.

The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201-219, requires employers to pay their employees a minimum hourly wage, which is currently $4.25. The Act defines "employer" as "any person acting directly or indirectly in the interest of an employer in relation to an employee," and defines "employee" as "any individual employed by an employer." Courts were ordered to construe these terms expansively in order to further the congressional goal of outlawing from interstate commerce goods produced in violation of the Act. Where the employee/employer status is uncertain, the law requires that the economic realities of the relationship, and not technical concepts of employment, are to control. The court in the instant case ruled that "[w]here ... inmates work in the prison ... pursuant to penalogical work assignments, the economic reality is that they are not employees." The district judge then launched off into some technical concepts (ignoring the economic realities) to justify his ruling that the FLSA does not apply to prison industrial workers.

This case also addresses constitutional and even a RICO claim. But all were lost when the court granted that state's motion to dismiss. Readers are urged to independently study each aspect of this case, as all are important in working to expand this field of the law. Although it is necessary to keep knocking on the judicial door in an effort to secure relief in this area (and to educate the courts on the futility of expecting some good to come from maintaining a segment of society in a perpetual state of irresponsibility, dependency, and slavery), the ultimate solution must be a political one. The courts will recognize political strength. Strength is gained though a nation-wide organization of class conscious prisoners and their supporters. And this organization must, at the very least, be prepared to wage an ongoing fight for the abolishment of the thirteenth amendment to the U.S. constitution.

Comrades interested in working on the cutting edge of the prisoners rights struggle should carefully study cases such as this. Learn how the plaintiffs lost, expand and perfect their arguments, and then file again. See: *McMaster v. State of Minn.*, 819 F.Supp. 1492 (D. Minn. 1993).

Clinton Unveils "Anti-Crime" Package

By Paul Wright

On August 11, 1993, president Clinton revealed his proposed new "anti crime" legislation. A few months ago I wrote an article in *PLN* concerning Clinton's campaign promises as they affected prisoners. It appears that things are worse than expected.

With Slick Willie having reneged or backed off on most of his major campaign promises (i.e. gays in the military, middle class tax break, etc.) it looks like he is going to deliver on his promise of repression, prisons and death. Coming from the man who interrupted his presidential campaign to fly home to publicize the execution of a mentally retarded black man, this is not surprising.

At the center of the proposal is spending $3.4 billion to put an additional 50,000 police on the streets. He calls this "a major downpayment" on his campaign promise for 100,000 more police. *PLN* readers should note that, according to the National Institute of Justice, there are approximately 500,000 Americans employed in law enforcement at all levels throughout the US. An increase of 20 % is a very significant increase no matter how you look at it. An increase in police is called a "front end load up." More police will mean more arrests, this is going to require an increase in judges, prosecutors and prisons a little farther down the line, they are the "back end" part of the process. With citizens/prisoners being the product they churn through the system. An increased police presence on the streets is supposed to make people feel safer. Yet who will protect citizens from the police?

As the contradictions caused by the economic decline of the US and increased rivalry with its other capitalist competitors heighten there will be increased repression at home. This process began back in the late 60's when the US was being racked by opposition to the Viet Nam war and there was a mass movement. The mass movement scared the ruling class and they have been reacting ever since. In his memoirs John Erlichman said the Nixon White House looked out their window at the 400,000 anti war demonstrators protesting outside the White House and had visions of the Bolsheviks storming the Winter Palace in 1917. Since roughly 1968 when Nixon was elected to office on a promise of an "Anti Crime" platform there has been an uninterrupted stream of repressive laws and practices, regardless of who the token figurehead is sitting in the White House. Almost every year since then has seen major "omnibus crime bills" with the purported goal of "getting tough on crime." The real effect of these laws has been the massive increase of sentences, the criminalization of more and more

Continued on bottom of next page...

behavior, more resources for domestic repression, more prisons and more cops. The judges appointed to the judiciary have reflected this repressive trend with the judiciary relegated to the role of being a rubberstamp for the prosecution.

Clinton's crime bill will also restore the federal death penalty for a wide number of federal crimes. George Bush tried to enact this same part of legislation into law in his last year in office. It looks like Clinton will finish what Bush started. At the behest of the National Association of Attorneys General and the National District Attorneys Association, Senate Judiciary Committee chairman Joe Biden (D-Delaware) has introduced a bill which would limit the availability of federal habeas corpus review to death sentenced state prisoners. For the first time this bill would impose a six month time limit in which to file and limit them to a single habeas corpus petition. The habeas corpus limits would be incorporated into Clinton's bill. Biden says his bill would ensure that poor capital defendants (as if there were any other kind!) would get lawyers "meeting tough, specific standards of knowledge and experience" at every step of the legal process. If past experience is any indication poor capital defendants are about as likely to receive competent, experienced legal counsel at every phase of the legal process as it is for leopards to change their spots.

By executive order, without waiting for approval from congress, Clinton ordered the Treasury Department to suspend importation of foreign made pistols and ordered a review of rules and laws concerning gun dealers. He also voiced his support for the "Brady Bill" gun control law which would impose a five day waiting period and background check on gun buyers. This too is part of the process that started in 1968 to restrict Americans legal access to firearms. It is interesting that these moves come in the absence of not only organized resistance to the government, but any resistance. Not waiting for a potential mass movement the ruling class has been steadily working on restricting citizens legal access to weapons. This trend really picked up in the mid 80's as increasing numbers of poor people, especially in the cities, gained access to weapons. When guns are outlawed only the police will have guns. And that is the main goal of these laws.

Supposed anti gun control president Reagan signed several gun control laws while in office and Bush promised to sign others if other legislation he backed was passed. There is no significant differences in most of Clinton's crime bill and that proposed by Bush in his last year of office (except for the vast increase of police) nor in their positions on gun control.

The fact remains that the continuing dynamic of repression and using prisons and the death penalty as a means of social control and social policy will continue unabated regardless of the figureheads in political office or which faction of the ruling class is in the white house. When Clinton was elected a large number of naive prisoners and citizens thought that there would be some change or differences between Clinton or Bush. Yet in foreign and domestic policy there has been no differences of substance. Until there is a party that represents the interests of the working class and poor people in general there will be no change for the better. Historically, empires in decline resort to increased repression at home and imperialist wars of intervention abroad. For example, England was hanging its citizens for pick pocketing and its gunboats and soldiers were always avenging some slight, real or imagined, abroad. The Roman and other empires illustrate this point as well. *PLN* will continue to report on Clinton's activities regarding his "anti-crime" bill. When passed into law this bill will be as successful in its stated goal of reducing crime as its many predecessors. Until something is done about the root causes of crime, namely the lack of meaningful jobs, all the prisons, police and state killings will continue to be a band aid for the symptoms of imperialist decay.

Families Against Mandatory Minimums

FAMM is a national, grassroots organization of the friends and family members of prisoners serving "mandatory minimum" sentences. In the 1980's, as part of the "war on drugs" the U.S. congress and many state legislatures passed laws mandating minimum sentences for many types of offenses, most but not all were drug offenses. The results were harsh sentences for even the most minimal drugs offenses. Mandatory minimums removed the discretion judges previously had in imposing sentences. Instead, this discretion was shifted to the prosecutor who, by choosing the charges to indict on and prosecute was, in essence, choosing the sentence as well. This resulted in many injustices such as defendants who choose to inform on their co-conspirators receiving lesser sentences than their underlings.

FAMM was formed to educate the public and lobby congress about changing mandatory minimum sentencing. They have rapidly grown and now have chapters in 34 states. Aside from large amounts of information on this subject they also publish an excellent bi-monthly newsletter called *Famm Gram* that is filled with information on sentencing laws, lobbying and the federal prison system.

The most important thing about FAMM is that it is the organized effort of prisoners, their friends and families. Mandatory minimums are a harsh injustice which victimizes those too poor to get good lawyers, those who won't inform on their associates, or who simply don't have anything the government wants. The effort to educate the public on this issue also serves to generate discussion on the wider issue of crime and punishment. This is a discussion from which all too often prisoners and their families, the most affected parties, are completely cut out of.

FAMM is a non profit, non partisan organization, any donations are tax deductible and go to a good cause. PLN strongly supports FAMM and urges our readers to do likewise. For more information write: FAMM, 1001 Pennsylvania Ave. N.W. Suite 200, South, Washington D.C. 20004. (202) 457-5790 (no collect calls).

Professionalism at Purdy Women's Prison

By V.M.

Being incarcerated here at the Washington Corrections Center for Women (WCCW) for the past few years, I have had the opportunity to observe the behavior of those designated by the state to make sure that we stay incarcerated, that being the guards. Or more appropriately termed, Satan's Minions, as I so fondly refer to them.

As you may or may not know, we here at WCCW recently won the cross gender pat search case that the DOC pathetically tried to enact. They even went so far as to say that the male guards employed here could conduct these intrusive body searches in a "professional" manner. And were I a person of a lesser sense of humor, I probably would have been outraged at such a blatant and obvious disregard for our well being.

I looked up the definition of "professional" in my ever-handy *Websters*, and interestingly enough, the definition did not seem to fit the behavior of the last four male correctional officers that mysteriously ceased working here in the past two months.

The DOC obviously has a different definition of "professionalism" than any of us incarcerated here, unless we're talking about sex offenders. And of course, the DOC has kept a tight reign on this information being leaked to the public.

I wonder if "professional" covers the guard that was fired after he was discovered taking "liberties" with an unconscious hospitalized female prisoner, while he was assigned to "guard" her? I think my favorite is the one that resigned yesterday to avoid the investigation that was being done on him for sending female prisoners money and packages.

As far back as 1983, when a female prisoner incarcerated here won over a million dollars from the state for a suit she filed after becoming pregnant by one of the guards here, this "professional" behavior has been hidden by the state. And still they had the audacity to insult and assault us by trying to give their male employees a license to sexually and mentally abuse us even further. Lets not forget the male guard still employed here that was grieved for the comment he made about the possibility of the cross gender pat searches being conducted here, "I can't wait," did absolutely nothing for the confidence I had in the "professionalism" being practiced here. Thankfully Governor Lowry saw the insanity of such a violation and prevented the state appealing the ban on cross gender pat searches to the U.S. Supreme Court.

Too, if the state is so confident that their male guards could indeed act in a "professional" manner, what is their point in telling us recently that our name tags now have to be worn up on our shoulders to draw the attention away from the breast area? Are they afraid that one of their "professional" male employees might suddenly become filled with uncontrollable desire and display his "professional" behavior in front of everyone, thus making it impossible to sweep the incident under the rug, as is the case with all the other past and ongoing incidents? Furthermore, why are we no longer allowed to wear short summer tops that reveal our belly buttons or midriff? Don't women on the streets have belly buttons? Will our elusive rehabilitation somehow be thwarted by our belly buttons showing? Or is it that the female prisoner's belly button is too alluring to be displayed in the company of so many "professionals"?

Maybe one day the DOC will see how ludicrous its reasoning is. However, since it is headed by a good majority of the male species, I doubt this is likely.

BOP Not Liable for Guard Raping Prisoner

Lisa Flechsig was a prisoner at the federal women's prison in Lexington, Kentucky. After undergoing surgery she was taken to a local doctor's office for follow up treatment. BOP guard Bruce Trent was assigned to escort Flechsig to the doctor's office. En route to the doctor's office Trent removed her handcuffs and told her his apartment was nearby and they could stop there for a drink. Flechsig told him she did not want to go to his apartment, Trent stated that if she did not go with him he would claim she had tried to escape. Trent took Flechsig to his apartment and raped her.

Flechsig filed suit against the Bureau of Prisons (BOP) and the United States under the Federal Tort Claims Act (FTCA) claiming that their negligence led to the rape. The district court dismissed the suit by holding that Trent was not acting within the scope of his employment when he raped Flechsig, thus the BOP and U.S. were not liable for his actions.

The court of appeals for the sixth circuit affirmed the lower courts dismissal.

The appeals court held that to determine liability under the FTCA the district court must apply the relevant state's tort law. In this case the appeals court agreed with the lower court that Flechsig had not presented any facts which would show a breach of duty by the BOP under 18 U.S.C. § 4047. "Plaintiff's negligence theory must be based on possible negligence of Bureau personnel other than Trent, who was not acting within the scope of his employment."

Flechsig pointed out that the BOP had violated its own internal operating procedures which require at least one same sex escort for prisoners leaving prison grounds for medical care. The appeals court held that: "The Program Statement,.. is not a regulation from which negligence for violation should arise *per se*... It is, instead, simply the Bureau's written statement of its internal operating procedures and thus insufficient to create *per se* liability whenever it is not followed. To hold otherwise would be to create a disincentive for the Bureau to have written procedures. An organization creates documents such as the program statement here as aspirational guidelines. To hold that failure to follow such guidelines creates potential Bureau liability would be to cause the Bureau to adopt as procedures only what is legally required. The Bureau should not be discouraged, due to fears of liability, from promulgating guidelines which improve performance."

In essence the BOP can have rules and policies but prisoners have no expectation to believe that the BOP will follow its own rules. The court is concerned more about the

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BOP paying some money in damages than in the fact that had the BOP followed its policy it is probable that Flechsig wouldn't have been raped in the first place. The court does not question the point of having rules or policies if they are not followed and an agency cannot be forced to comply with its own regulations through court action. See: *Flechsig v. United States*, 991 F.2d 300 (6th Cir. 1993).

Murderer Fired From Prison Job

By Paul Wright

Massachusetts is currently being ruled by the Republican Weld administration. Governor Weld was elected to office on a "tough on crime" platform. Weld is himself a former federal prosecutor. Among his more interesting campaign promises were those to restore the death penalty in Massachusetts and to remove color TV sets from every state prison (presumably the black and whites will go too).

Even the Weld administration is a bit embarrassed by the news that it hired Gerry Dale for the $621 a week job monitoring whether or not state prisons and jails were adhering to state regulations governing the security and treatment of prisoners. What is unusual about Dale is that he himself is a convicted felon, whose employment in a correctional job is prohibited by state law.

Dale is a former federal prison guard. He served three years in prison for murdering a prisoner. While transporting a busload of prisoners in North Carolina he ordered an ace bandage and duct tape wrapped around the face of bank robber Vinson Harris. Harris suffocated to death and Dale was charged with violating Harris' civil rights. Facing life in prison, Dale pleaded guilty to assault with intent to injure and was sentenced to nine years. What is quite ironic is that Weld was the head of the U.S. Justice Department's criminal division at the time and he authorized Dale's prosecution. After reading about Dale's past in the *Boston Globe* Weld ordered his suspension.

Massachusetts DOC commissioner Larry Dubois would not comment on the matter, but in a previous interview had described Dale as a "shining star" in the department. Dale was still on parole when the DOC hired him for his job. DuBois had earlier said that he hired Dale after former federal prison director Michael Quinlan lobbied on Dale's behalf. Quinlan had earlier suspended Dale while the Justice Department prosecuted him.

All too often prisoners see guards get away with misconduct and violations of state and federal law with impunity, and ask what does it take for a prison official to be held accountable. In this case a guard is actually convicted of killing a prisoner, goes to prison himself (likely one of the plush "country clubs" we hear so much about), and while on parole is hired to monitor a DOC's treatment of prisoners. This would be like appointing a Nazi concentration camp commandant to the post of United Nations Human Rights Commissioner. What is telling about this case is that Dale was hired and employed by the DOC without any type of question until the *Boston Globe* and public outcry made this an issue.

"Convicts" Rename Club After Dead Guard

On June 25, 1992, Mansfield, Ohio prison guard Thomas Davis, a Vietnam veteran (he served four years as a military policeman in the navy in Viet Nam) was allegedly stabbed by prisoner Roy Slider. The wounds were not fatal and Davis was expected to recover, but due to an incorrect dosage of steroids at the hospital Davis died. Slider is awaiting trial on charges of attempted murder.

On May 31, 1993, the 65 member Mansfield Correctional Institution chapter of Vietnam Veteran's of America renamed their chapter after Davis. Chapter president Domonic Humenik gave a speech eulogizing the dead guard in a memorial day service held in the prison visiting room. He is quoted in the June 1, 1993, edition of the *Columbus Dispatch* as saying "It's our way of showing not all of us are animals."

Chapter vice president Don Golden was quoted as saying "We are proud to have our chapter bear his name. We will always hold dear his memory." Both Golden and Humenik are prisoners at Mansfield.

At the ceremony Eddie Davis, Thomas' brother, shared with the prisoners the American Police Hall of Fame Medal of Honor which his brother had been awarded after his death. He wore the medal around his neck at the ceremony.

Cops Shaft Informant

In 1989 John Fay was serving a 15-35 year sentence for a second degree murder committed in 1973 and a 1984 armed robbery. While at the county jail pending a hearing on the robbery conviction, Fay came in contact with two guys who had just been arrested for an across the state crime spree. The two men, both in their early 20's, approached the 49 year old Fay with an escape plot. The two youngsters had outside help and they planned to take hostages.

Fay contacted the sheriff on duty, who in turn told the plot to the Pennsylvania State police stationed nearby. Fay subsequently met with the state police and agree to pretend to join the escape plan and to introduce one of the police officers as an associate of Fay's who would assist in the escape. In return, the state police promised Fay he could stay in the county jail as a trusty, and where he could have furloughs. Fay faithfully performed the undercover work for the police. A week later he was transferred to a more secure facility.

When Fay tried to collect his 30 pieces of silver (the transfer to a better joint), corrections officials told him they were not bound by any promise made by the state police. Fay's immediate captors said: "Fay is a dangerous prisoner with an admitted history of escapes from less secure facilities, and any agreement to reduce his confinement status would be void as against public policy." Fay then filed a civil rights suit in federal court.

The district court judge found "that officers of the Pennsylvania State Police promised Fay a specific benefit, namely transfer to a lower security institution..., in exchange for the assistance Fay offered in working undercover

to flush out the kidnapping plot." The judge went on to hold that "the negotiations [between Fay and the state police] led to a binding bilateral executory contract." The problem for Fay was that the existence of such a contract does not present a federal § 1983 claim. Accordingly, the district judge dismissed Fay's complaint. In doing so he had a parting shot for the state. "I am constrained to comment," the judge said, "that regardless of the legal niceties, Fay voluntarily risked his life to save several other persons..., and the Department of Corrections, as a branch of the same government as the Pennsylvania State Police, owes Fay a moral debt to consider easing the burdens on his confinement." Fay's last noted place of confinement was S.C.I. Pittsburgh. See: *Fay v. Ryan*, 818 F.Supp. 822 (W.D. PA 1993).

Some Food for Thought: Prisoners Are Not Inmates

By Ojore Lutalo

[**Editor's Note:** *Readers will note that PLN rarely refers to prisoners as "inmates" or "residents." We usually change any such terms to "prisoners" when we reprint pieces or publish articles. Ojore, a New Afrikan political prisoner, explains the reasoning behind this.*]

The vast majority of prisoners (especially politically conscious prisoners) resent being referred to as "inmates" because we are being detained as prisoners, which means against our will! The word "inmate" is used mostly by prison functionaries, attorneys (not progressive attorneys) and whoever else is employed in the so-called field of correction.

It's very important to acknowledge how languages become sterilized and de-radicalized and that soon, the warders (including some of the prisoners themselves) could be referring to the prisoners as "residents" as if we were on vacation or something else in that regard!

Penologists control the prisons and it's their goal to distort the reality of prisons and prisoners by identifying prisons as "correctional facilities" as opposed to "prisons" and "penitentiaries," while identifying prisoners as "inmates" or "residents" as opposed to "prisoners" in their endeavors to lull the general public into thinking that conditions in captivity are humane and that the warders operating the prisons (spelt concentration camps) are caring human beings and the captive audience being detained (they use the word inmates) are being rehabilitated and not actually being punished as the supporters of the prisoners out there in the communities at large are asserting! Prison wardens are now referred to as superintendents or administrators as opposed to "wardens." Prison security guards are in fact referred to as "correction officers" as opposed to "security guards" because such titles sound more humane and less threatening.

Again, by giving prisons and prisoners a less radical label they, the functionaries who operate these concentration camps and their supporters, hope people out there in the communities at large will forget about all of the inhuman conditions of prisons.

Letters From Readers

Grievance System Sham

This letter is directed specifically at inmates within the Florida Department of Corrections, but may be of interest to any prisoner utilizing the grievance procedure in their state.

If the grievance procedure is "certified," as it is in the State of Florida, exhausting administrative remedies is required by the state and federal courts prior to filing a lawsuit.

I personally view the procedure in Florida, especially Baker Correctional Institution, as a "sham" and a vehicle used by officials to distract you from the actual cause of the grievance, by giving you inane responses that have little or nothing to do with the grieved issues. Generally, one official will lie and fifty others will swear to it.

After the informal grievance to institutional officials, the appeal goes to the department's inmate grievance committee. There, they request extension of time after extension, which is generally denied by the prisoner, and taken anyway by the committee.

The Administrative Code of Florida, and most likely your state, has a provision that grievances will be responded to within 30 days UNLESS an extension is agreed upon by the parties. I have had the DOC take up to four unauthorized extensions and know of instances where up to seven have been taken. This outlaw practice effectively puts the brakes on any judicial civil action.

In designating a time period in which the grievance appeal is to be answered, this creates a ministerial duty for the committee, and gives the prisoner a clear and legal right to that response. Thus, mandamus is applicable to compel the committee to respond in a timely manner.

I have developed a "form" Petition for Alternative Writ of Mandamus to compel a response in the State of Florida and a "form" for *In Forma Pauperis* that even a prisoner who has absolutely no experience in legal matters can utilize. Inmates from other states may want to modify the form by changing some of the provisions to comply with their rules of court or administrative code.

I urge prisoners from all states, especially Florida, to contact me for copies of these forms. Please send two postage stamps so the cost of postage will not stifle my efforts to compel prison officials to do their jobs.

John Gertesen # 284238
P.O. Box 500
Olustee, FL, 32072-0500

PA Women File Suit Over Property

Our other lawsuit, on our property, seems to be at a standstill. The defendants filed an answer to our complaint, we filed an answer to their answer and now we're just waiting. We've heard nothing since June. We tried for a TRO/Preliminary Injunction but the judge denied both as well as our request for counsel. Meanwhile, the "search

Continued on bottom of next page...

team" (AKA "goon squad") keeps coming into our cells and taking our property which doesn't comply with the new property regulations. This place is a pit and we have a warden, Mary Byrd, who is a psycho. I get so upset at these women, because they just won't stick together on anything. That's why we're treated worse than male prisoners.

None of the women's litigation groups in Pennsylvania are worth squat. We've tried N.O.W. and they never answered. We've tried the Women's Law Project, and they said they were "too busy."

D.M. Muncy, PA

Needs Haircut Information

I need to know if any prisons in the United States, state or federal, allow their prisoners to grow beards and have long hair. If you don't have their address just listing their names would be a start.

Prisoners here at the Georgia State Prison have filed a class action suit on this issue. We are required to cut off all the hair on our head, military fashion, and are not allowed any hair on our faces. The state claims this is for sanitation and security reasons. We need to show that other prison systems allow prisoners to have beards and long hair without any problems. If *PLN* readers can send us policies and affidavits on this issue it would be very helpful.

John Harris # EF291-705
H.C.O.1 Star Route,
Georgia State Prison
Reidsville, GA. 30499

Prison Flooded

We at Menard are suffering the ravages of the Mississippi river flooding. Because of the flooding, all normal services are up in the air. We are given potable water in half ounce little milk containers, and not in sufficient quantities to wash with. The prevailing wind comes in to us from across a pig farm and the smell of the pig feces combined with the rancid stench of decaying, unwashed bodies create a totality of conditions far beyond any punishment a sentencing court could envision. We should be given many extra "good time" days for every day spent in this fetid oubillette. The problem is that the jive turkey that runs this "place of wrath and tears" can't handle the river and the men at the same time. He's put the prison on lockdown in 95 plus degree heat and just doesn't care.

C.M. Menard, IL.

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Working to Extend Democracy to All

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Litigation and Service Protected by First Amendment

Eric Schroeder is a Hawaii state prisoner. While working in the prison law library he assisted other prisoners with their legal problems. Another prisoner asked Schroeder to serve Tranquillino Mabellos, a staff education specialist at the prison, with a summons and complaint in a civil action. Schroeder agreed and served Mabellos in Mabellos' office. Mabellos ordered him to retrieve the summons which Schroeder refused to do and walked away. The next day Schroeder was suspended from his law library job. Mabellos infracted Schroeder for refusing to obey an order (not recalling the summons), lying to staff and that his possession of the summons was unauthorized. Schroeder was found guilty of the first charge and not guilty of the others and sentenced to 14 days of segregation. Schroeder filed suit claiming that the actions were in retaliation for his having engaged in constitutionally protected activities.

The district court notes that assisting another person in litigation is a form of expression and association protected by the first amendment which prisoners still retain. Service of process is also an expressive act protected by the first amendment. The court notes that Fed.R.Civ.P. 4 and *Benny v. Pipes*, 799 F.2d 489 (9th Cir. 1986), amended 807 F.2d 1514, specifically allow for service by prisoners in a federal lawsuit. The court in *Benny* recognized that service of process enjoyed constitutional protection. "The summoning of a defendant to answer in a federal court is an integral part of the federal court system. As such, it is protected by the first amendment..."

The district court rejected the defendant's attempt to justify Schroeder's punishment as being necessary for prison security. "...in order to show that Schroeder's punishment was justified, the defendant must justify the legality of Mabellos' order."

The court also denied the defendant's motion for summary judgement holding that factual questions as to what prison policy was on personal service of process prevented summary judgement at that time. Because the law was clearly established that prisoners had a right to serve process on prison officials, any restrictions on the right to serve process must be reasonably related to a legitimate penological objective.

The court held Schroeder had adequately stated a claim for a conspiracy by the defendants to retaliate against him for the exercise of his first amendment rights. Schroeder had also alleged sufficient facts to state a claim for retaliation, namely a chronology of events between the protected action (serving Mabellos with the summons) and the retaliatory response (the infractions and being fired from the law library) and by alleging that the retaliation served no legitimate penological goal.

The court held that the Hawaii prison regulations concerning work assignments create a due process liberty interest enforceable in federal court under § 1983. See: *Schroeder v. Mabellos*, 823 F. Supp 806 (DC HI 1993).

Well Established Right to Release from Control Unit

Harvey Hall is a Missouri state prisoner. While in protective custody at the Missouri State Penitentiary (MSP) Hall was found in possession of contraband and placed in the Special Management Facility (SMF). After six months in the SMF the classification committee recommended that Hall be returned to protective custody, the warden's designee approved the recommendation but Hall remained in the SMF. Over the next year this process was repeated four times and yet Hall remained in SMF. Hall was eventually reassigned back to protective custody. He filed suit under § 1983 claiming that Missouri prison officials had violated his eighth and fourteenth amendment rights by failing to release him after the recommendations for release had been approved. The defendants moved for summary judgement and sought qualified immunity from damages. The district court denied both motions and the state appealed. The court of appeals for the eighth circuit affirmed the lower court ruling.

The appeals court gives a detailed discussion of the doctrine of qualified immunity which allows prison officials to "generally rely on the defense of qualified immunity to protect them from liability for civil damages." That defense fails, however, when the right violated was clearly established and prison officials knew or should have known that their actions violated those rights.

The appeals court held that the law was clearly established at the time of Hall's prolonged detention (1989) and the defendants were not entitled to qualified immunity. In *Knight v. Armontrout*, 878 F.2d 1093 (8th Cir. 1989), the court held that Missouri administrative segregation policies created a protected due process liberty interest. In this case the court reaffirmed *Knight* by holding that MSP regulation

Continued on next page...

20-212.040 (11)(A)(B) "Release from the Special Management Facility" creates a due process liberty interest enforceable in federal court under § 1983.

The court held "Any reasonable official would understand that once Hall obtained final approval for release, he had a legitimate expectation of being released in a reasonable amount of time, and that failing to meet that expectation for such a long time violated Hall's rights. The unlawfulness of prison officials' actions is apparent in view of preexisting law. The right is not abstract,and the situation did not require the officials to guess about the future development of constitutional doctrine. Although the prison officials followed the general procedure in recommending and approving release many times, they withheld the end result of that procedure—release."

"Hall may not have the right to receive a recommendation of release or to have a recommendation approved, but once the recommendation and final approval were both given, he had an interest in being released within a reasonable time period." "We conclude that general, well established legal principles, so evident that they would be confirmed by common sense, would have alerted a reasonable prison official to the fact that Hall's rights were being violated by the extended delay."

The warden and the DOC commissioner both sought summary judgement claiming a lack of personal involvement and knowledge in Hall's situation. The appeals court notes that it has "consistently held that reckless disregard on the part of a supervisor will suffice to impose liability." Noting that prison regulations require that the warden be informed of all SMF assignments, reasons for the assignment and the length of time assigned and that the warden must personally review the file of all prisoners assigned to SMF for more than one year and determine, in writing, whether the prisoner will be retained in SMF. The warden must send a report to the director for review and advice on retention of prisoners in SMF for over one year. Their compliance or noncompliance with these regulations may establish actual knowledge or reckless disregard for Hall's rights. The court held that whether they actually knew or should have known of Hall's status and acted or failed to act in such a way that would impose liability was a fact question for a jury to resolve. See: *Hall v. Lombardi*, 996 F.2d 954 (8th Cir. 1993).

Florida Conditions Victory Reversed

This 42 U.S.C. § 1983 case was initiated by ten present and former prisoners at Glades Correctional Institution (GCI) in Florida. They sought money damages and injunctive relief for cruel and unusual punishment and other unconstitutional conditions of confinement. The district court held a trial and granted damages and issued the requested injunction in favor of the prisoners. The state appealed to the U.S. court of appeals for the eleventh circuit, which reversed the lower court and remanded the case for a new trial.

On May 14, 1982, Anthony LaMarca filed a hand-written *pro se* complaint in the U.S. district court stating he had been countlessly approached, threatened with physical violence and assaulted by other inmates at GCI because he refused to participate in homosexual activities, or to pay protection to be left alone. He alleged that "a severe lack of protection" existed at GCI and "the institution seemed unable or unwilling to handle the situation." The complaint was subsequently amended to, among other things, add more prisoner plaintiffs who had been raped or assaulted at Glades.

On July 16, 1981, then warden Turner wrote a letter to his superior in which he described the prevailing atmosphere at GCI: "On almost a daily basis I feel that our security staff is simply being tolerated by the inmate population rather than being in control of the operation of the prison." According to the district court, prison officials made "little or no effort ... to control illicit activity at GCI." Inmates carried knives and openly used drugs. "The contraband problem was compounded by staff corruption," the appeals court said, "as prison officials contributed to, and apparently profited from, the contraband, and utilized prisoners to 'control' and punish other prisoners."

GCI's staff permitted regular, unsupervised showings of hard-core pornographic movies. During the movies, witnesses testified, "sounds of inmates screaming and crying could be heard."

When alerted to specific dangers, prison staff often looked the other way rather than protect prisoners. Instead of offering to help, the staff suggested that the inmates deal with their problems "like men," that is, use physical force

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against those giving them problems. This type of atmosphere led to incidents such as a group of prisoners, one brandishing a bush axe, to unsuccessfully attempt to rape plaintiff LaMarca in the dorm. Prisoners raped plaintiff Saunders in a small bathroom adjacent to the confinement area; he reported the incident but officials did not investigate and refused his request for a medical examination. Inmates raped plaintiffs Aldred and Durrance in shower areas. Aldred reported the incident to a guard, but there was no investigation. Plaintiff Bronson was sexually assaulted with the handle of a baseball bat on GCI's recreation field. Other plaintiffs were raped, beaten, and stabbed, and their aggressors were protected because of their "special relationship" with their captors.

It was in the face of these conditions (conditions that caused the Palm Beach Grand Jury to recommend changes in light of "accusations of drugs, alcohol, and other contraband, gambling, theft, confiscation, and payoffs among the inmates and personnel of GCI", that caused the district court to find a constitutional violation, award damages to the prisoners, and grant the requested injunctive relief. The state of Florida appealed to the eleventh circuit court of appeals. The appeals court set aside the damages, vacated the attorney fees, modified the injunction, and reversed for a new trial. The appellate court found that warden Turner had not properly waived his right to a jury trial. The waiver was valid for the initial complaint, but not for the amended complaints subsequently filed. See: *LaMarca v. Turner*, 995 F.2d 1526 (11 Cir. 1993).

WI Ad Seg Rules Don't Create Liberty Interest

Wisconsin regulations governing the transfer of state prisoners to "temporary lockup" status do not create a protected liberty interest under the fourteenth amendment due process clause, a majority of the Wisconsin supreme court ruled June 3, 1993. The majority agreed with *Smith v. Shettle*, 946 F.2d 1250 (7th Cir. 1991), that a statute that permits, but does not specifically require, administrative segregation may nonetheless be sufficiently "mandatory" to create a protected liberty interest. Nevertheless, the majority identified a feature of Wisconsin Administrative Code Section DOC 303.11 that precludes due process scrutiny. The regulation does not sufficiently confine the discretion of prison officials to create a protected interest, the court said, because under it an inmate may be segregated based merely on an official's subjective belief that certain conditions are met; "it is not dependent on the realities of the situation." Because a prisoner's rights are "in no way dependent on the realities of the situation, but only upon the perceptions of the officers, *Russ v. Young*, 895 F.2d 1149 (7th Cir. 1990), Section DOC 303.11 does not create a protected liberty interest," the majority held. Dissenting on this point, Justice Abrahamson, joined by Chief Justice Heffernan, argued that the state regulations did create a protected liberty interest. *Casteel v. McCaughtry*, Wis SupCt. No. 91-0218. 53 CrL 1313 (July 7, 1993).

Standard for Modifying Consent Decrees Explained

In 1976 prisoners in the Hamilton County, OH, jail filed suit challenging their conditions of confinement. The parties entered into a consent decree which settled all claims. Within five weeks of the decree's entry, in 1985, the jail's population began to exceed its design capacity. The plaintiffs filed a contempt motion based on the overcrowding and the use of 300 cots to accommodate the excess prisoners. The parties then negotiated another modification to the consent decree which set population caps, prohibited the use of cots and allowed some double celling of low risk prisoners.

The defendants failed to comply with these and other stipulations. In 1991 the district court on its own motion ordered a hearing why its supervision of the case shouldn't be terminated. The district court then modified the decree by lifting the population cap and expanding the categories of prisoners to be double celled. The court of appeals for the sixth circuit vacated and remanded.

The appeals court listed the facts a district court must determine in deciding whether and when to terminate jurisdiction over a consent decree. The factors include: specific terms providing for continued supervision and jurisdiction over the decree, the decree's underlying goals, compliance with past court orders, whether the defendants have made a good faith effort to comply, the length of time the decree has been in effect, and the continuing efficacy of the decree's enforcement.

The appeals court vacated the lower court's modification on several grounds. The court lists the elements of proof borne by the party moving to modify a consent decree. It held that the lower court erred in approving the modification by relying on unverified statements, unauthenticated material and counsel's oral argument in ruling in the defendants' behalf. The district court failed to conduct a "complete hearing" by not allowing expert testimony at the motion hearing.

The district court erred by not considering the factors in *Rufo v. Inmates of the Suffolk County Jail*, 112 S.Ct. 748 (1992). "...neither defendants nor the district court identified a 'significant change in circumstances' warranting revision of the consent decree." "In fact, overcrowding had been an ongoing problem over several years... Second, the district court did not inquire into the good faith of defendants' settlement intentions or anticipation of changes in conditions that would make the consent decrees onerous and unworkable... Third, the district court failed to determine if the proposed changes were 'suitably tailored to the changed circumstances... more importantly, however, the district court should have required defendants to present evidence in support of their position to allow double celling and to increase the inmate population, with an opportunity then for the plaintiffs to contradict the evidence." See: *Heath v. Decourcy*, 992 F.2d 630 (6th Cir. 1993).

§ 1983 Not Estopped by State Court Ruling

Santiago Ramirez is a New York state prisoner. An informant told a prison sergeant that Ramirez had a shank concealed in his cell. Acting on this information Ramirez's cell was searched and a shank was found. Ramirez was infracted and at his disciplinary hearing he requested that the sergeant and the informant appear to answer his questions. The hearing officer denied these requests, found Ramirez guilty and sentenced him to 30 days loss of good time, 60 days in segregation and loss of phone and commissary privileges.

Ramirez brought an Article 78 proceeding in New York state supreme court. The state court annulled the disciplinary board ruling holding that the denials of his requests for the witnesses was improper. The court reinstated his lost good time but by that point Ramirez had already served the segregation time and loss of privileges. The defendants did not appeal the state court ruling.

Ramirez then filed suit under § 1983 in federal court seeking compensatory and punitive damages for the denial of his request to call witnesses at the hearing. Money damages are not available in Article 78 proceedings. He sought summary judgement based on the Article 78 ruling, by arguing that the doctrine of collateral estoppel prevented the relitigation of issues by the defendants.

The district court disagreed citing *Gutierrez v. Coughlin*, 841 F.2d 484 (2nd Cir. 1988) for the prospect that a state judgement has no preclusive effect on federal actions. Because "damages for civil rights violations may not be recovered in an Article 78 proceeding" the defendants do "not have the same incentive to litigate that state court action as they did the federal § 1983 action." In other words, as long as it's only a question of a prisoner remaining in prison longer it's no big deal; once there is money involved things change.

The court held that there were material issues of fact precluding its ruling on both parties summary judgement motion. The court gave a good discussion of prisoners' right to call witnesses at prison disciplinary hearings and noted that prison officials bear the burden of showing that refusal to call witnesses at a disciplinary hearing furthered a legitimate institutional goal. Because Ramirez set forth facts showing the need and reason to call witnesses, it was up to a finder of fact to determine if the hearing officers refusal to call the witnesses was proper. See: *Ramirez v. Selsky*, 817 F. Supp 1090 (SD NY 1993).

Statement of Claim Must Rely Solely on Complaint

Scott Swoboda was a jail detainee in Doniphan County, Kansas. He filed suit under § 1983 over numerous conditions of confinement at the county jail. The district court dismissed the suit pursuant to Fed.R.Civ.P. 12(b)(6), concluding that the lawsuit failed to state a claim upon which relief could be granted.

The court of appeals for the tenth circuit affirmed in part, reversed in part and remanded. As a preliminary matter the appeals court held that it had jurisdiction to hear the appeal even though Swoboda gave his notice of appeal to jail officials the day it was due in court. The court concluded this was sufficient because "We decline to second guess whether Swoboda, if not incarcerated, would have mailed his notice of appeal or made other efforts to insure that it was filed timely."

Addressing the merits of Swoboda's claims the court held that the lower court had correctly dismissed the jail conditions claims because Swoboda had not stated how they directly affected or harmed him and were thus conclusory allegations not entitling him to relief.

Swoboda fared better on his excessive force claim. In his suit he stated that the county sheriff "assaulted, beat and disfigured" him during his arrest. The lower court dismissed this claim because the defendants had submitted affidavits denying the allegation.

The appeals court notes that the court's function in a Rule 12(b)(6) motion is not to weigh evidence but "to assess whether *the plaintiff's complaint alone* is legally sufficient to state a claim for which relief may be granted." "In determining whether a plaintiff has stated a claim, the district court may not look to the *Martinez* report, or any other pleading outside the complaint itself, to refute facts specifically pled by a plaintiff, or to resolve factual disputes."

The court noted that excessive force during arrest violates the fourth amendment's ban on unreasonable searches and seizures. Swoboda's complaint adequately pled sufficient facts to state a claim for relief. The court remanded this portion of the complaint for further proceedings and suggested that the district court reexamine Swoboda's state law claims and motion for the appointment of counsel. See: *Swoboda v. Dubach*, 992 F.2d 286 (10th Cir. 1993).

No Right to Forfeit Goodtime

Helen Woodson was a federal prisoner serving twelve years on four counts of destroying government property arising out of protests at ICBM missile sites. She is a member of the Plowshares, a Christian group that takes literally the bible's command to beat swords into plowshares (i.e. they enter military bases and attack missiles, submarines, etc., with hammers). Since Woodson has been in prison she has lost good time credits for escape, arson, destruction of government property, inciting to riot and lock tampering. She is concerned about good time credits she has accumulated and not lost. She filed suit in United States district court to forfeit all of her good time credits. Her view is that accepting good time credits, and an early release from prison, would violate her religious beliefs.

The district court granted Woodson's cross motion for summary judgement, *Woodson v. U.S. Department of Justice*, 770 F. Supp 25 (DC DC 1991), holding that she had a right protected by the ninth amendment to waive her good time credits. The district court ruling is premised on the theory that the ninth amendment protects the "'right' to refuse

privileges or rights" and one cannot be compelled to accept a right or privilege. The court of appeals for the District of Columbia circuit reversed.

The appeals court provided an extensive discussion of 18 U.S.C. §§ 4161, 4163, 4164 and 4165, the federal good time and commutation statutes. The court held that because Congress has written the good time statutes in mandatory language prisoners cannot forfeit their good time credits, the only means of losing good time credits is by a disciplinary board who takes the credits as punishment for misconduct within the BOP.

"Sections 4161 and 4163 thus create a scheme in which a prisoner *automatically accumulates* credits for good conduct, and is *mandatorily released* upon accumulation of a certain amount." The court lists several cases holding that the commutation and good time statutes are mandatory on both prisoners and the BOP. The court held that, absent a statutory right to waive good time, the ninth amendment was irrelevant to Woodson's claim. This case provides helpful background to the legislative history and intent of the federal good time statutes and will be helpful to anyone litigating this issue. See: *Woodson v. Attorney General*, 990 F.2d 1334 (DC Cir. 1993).

[***Editor's Note:*** *As we go to press the anarchist magazine* ***Wind Chill Factor*** *reports that as a result of this court decision Woodson was released from prison on June 14, 1993. Three days after her release Woodson walked into a Chicago bank with a starter pistol and asked the teller to empty the cash drawers. Taking the money, about $25,000 in cash, she emptied it on the floor and doused it with lighter fluid, ignited it and told the patrons to sit down and listen to her statement. She expounded her view that money is the root of all evil. Police were waiting as she emerged from the bank and she was arrested. She is now in custody in the Chicago MCC, having declined the services of a public defender she is representing herself. She is pending a psychiatric evaluation.*]

Seg Prisoners Entitled to Congregate Religious Services

Richard Salahuddin was a muslim New York state prisoner. In 1985 he was transferred to the Sullivan Correctional Facility (SCF), which was still under construction. At the time of his transfer and during his stay at SCF he was on "keeplock" status, as were all other prisoners at the prison at that time. He requested that congregate muslim services be held at SCF. Prison officials denied his requests and he filed suit under § 1983 claiming violation of his right to free exercise of religion.

The district court granted summary judgement to prison officials, dismissing the lawsuit, by finding that the DOC had acted reasonably in denying Salahuddin's request for congregate religious services. The court of appeals for the second circuit reversed and remanded.

The appeals court noted that prisoners have a constitutional right to participate in congregate religious services. Confinement in segregation does not deprive prisoners of this right. But these rights are not absolute. Applying the Supreme Court's test for prisoner's free exercise claims, *O'Lone v. Estate of Shabazz*, 482 US 342, 107 S.Ct 2400 (1987), the court held the defendants had failed to meet their burden of proof.

The court noted that SCF had a recreation yard where congregate religious services could have been held at minimal costs to prison administration and security. The defendants presented only conclusory assertions to the contrary. Moreover, the district court erred in accepting the defendants affidavits on this disputed issue when it refused to allow Salahuddin to conduct discovery.

The appeals court also found error where the lower court failed to consider whether, even if it was reasonable to deny Salahuddin's requests, it was reasonable to transfer prisoners to SCF whose constitutional rights would be violated by the lack of religious services, instead of transferring those whose rights would not be compromised. Because the DOC engaged in a selection process of which segregated prisoners it would move to SCF and knew it would refuse to allow congregate religious services it was not reasonable to transfer Salahuddin when prison officials knew or could have easily determined which prisoners were religious participants.

In reversing, the court of appeals instructed the lower court to permit discovery to help determine the reasonableness of transferring prisoners to SCF who required congregate religious services. See: *Salahuddin v. Coughlin*, 993 F.2d 306 (2nd Cir. 1993).

Prosecutorial Liability Explained

Stephen Buckley sought damages, under 42 U.S.C. § 1983, from prosecutors for fabricating evidence during the preliminary investigation of a highly publicized rape and murder case in Illinois, and for making false statements at a press conference announcing the return of an indictment against him. He claimed the prosecutors violated his rights when three separate lab studies failed to make a reliable connection between a bootprint at the murder site and his boots, and when the they obtained a positive identification from one Robbins, who allegedly was known for her willingness to fabricate unreliable expert testimony. Thereafter, the prosecutors convened a grand jury for the sole purpose of investigating the murder, and 10 months later, the prosecutor announced the indictment at the news conference. Buckley was arrested and, unable to meet the bond, held in jail. Robbins provided the principle evidence against him at trial, but the jury was unable to reach a verdict. When Robbins died before Buckley's retrial, all charges were dropped and he was released after three years of incarceration.

In the § 1983 action, the district court held that respondents were entitled to absolute immunity for the fabricated evidence claim but not for the press conference claim. However, the court of appeals ruled that they had absolute immunity on both claims, theorizing that prosecutors are entitled to absolute immunity when out-of-court acts cause

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injury only to the extent a case proceeds in court, but are entitled only to qualified immunity if the constitutional wrong is complete before the case begins. The case went up to the U.S. Supreme Court, which held that prosecutors are not entitled to absolute immunity for acts committed outside of their prosecutorial duties.

The Supreme Court held that certain immunities were so well established when § 1983 was enacted that it was presumed that congress would have specifically so provided had it wished to abolish them. Most public officials are entitled only to qualified immunity. However, sometimes their actions fit within a common-law tradition of absolute immunity. Whether they do is determined by the nature of the function performed, not the identity of the actor who performed it. Prosecutors, the court noted, have absolute immunity only for conduct that is intimately associated with the judicial phase of the criminal process.

Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protection of absolute immunity, the court held. However, in endeavoring to determine whether the bootprint had been made by Buckley, respondent prosecutors were acting not as advocates but as investigators searching for clues. Such activities were not immune from liability at common law. If performed by police officers and detectives, such actions would be entitled to only qualified immunity; the same immunity applies to prosecutors performing such investigations.

In addition to the investigatorial work, the court held that the prosecutor's statements to the media were held not entitled to absolute immunity. There was no common-law immunity for prosecutor's out-of-court statements to the press, as such comments have no functional tie to the judicial process just because they are done by a prosecutor. The court also concluded that policy considerations do not support extending absolute immunity to press statements. The court noted there is a presumption that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. See: *Buckley v. Fitzsimmons*, ___ U.S. ___, 61 LW 4713 (June 22, 1993).

Chain of Custody on Urine Sample

Federal courts in New York have held that due process requires a prison disciplinary body to establish a reasonably reliable chain of custody as a foundation for introducing the results of urinalysis tests into evidence at prison disciplinary hearings. This chain of custody requirement, the courts have said, mandates a continuous, physical nexus between the source of the substance in issue, the testing or analytical process to which the substance is subjected, and the proponent of the substance as real evidence.

It is from within the above legal context that Christopher McCormack used a civil rights complaint to argue that the chain of custody on his urine sample was defective and that the EMIT tests results were unreliable. McCormack had been found guilty of marijuana use at a prison disciplinary hearing. His challenge of the EMIT screening test failed but he did win the chain of custody battle. The court ruled that he should have been permitted to call a guard as a witness to explain discrepancies in the urinalysis request form, and that no valid reason for not calling the witness was given.

This is one of those borderline cases that will be of little interest to anyone other than those involved drug testing litigation. *PLN* lists the case because the struggle against mandatory drug testing is an important one. This case covers many aspects of the issue and should be read by anyone interested in the subject. See: *McCormack v. Cheers*, 818 F.Supp. 584 (S.D. NY 1993).

Pages from a Jailhouse Journal

By Nick DiSpoldo

The present Supreme Court, led by Chief Justice William Rehnquist, has modified nearly all of the rights granted prisoners under the Warren court (1953-69). Mr. Rehnquist, whom I suspect serves as technical advisor for television's *Night Court*, was appointed to the court in 1972 by Nixon and named Chief Justice by Reagan in 1986. Rehnquist has consistently voted against expanding prisoner rights and has sought to reconstruct the historical iron curtain that, prior to the Warren court, always existed between the constitution and the American prisoner.

It would be difficult to understand the relative regressiveness of the Rehnquist court without understanding the historical evolution of prisoners rights.

I have structured this evolution in what I call the four R's: Revenge, Repentance, Rehabilitation, Regression.

There was a time when Dante's phrase for the gates of hell - "Abandon hope, all ye who enter" - would have been an appropriate inscription to have placed at the gates of America's prisons. In the eighteenth century, New York's Auburn Prison employed the "silence system"; prisoners were not permitted to even speak to one another, the Bible was the only permissible reading material and prisoners were encouraged to be repentant. The word "penitentiary", in fact, derives from "pentinent", the penological prescription prisoners were expected to fill. Prisoners, of course, were stripped of all civil rights and suffered total civil death.

In researching prison related cases, I "discovered" this case in *Ruffin vs. Commonwealth* (1871), which reflected a judicial attitude that persisted well into the twentieth century. The Virginia Supreme Court declard: "As a consequence of his crime, the felon forfeits not only his liberty, but also his personal rights, except those which the law in its humanity affords him... He is for the time being the slave of the state."

The Supreme Court was established in 1789 and it was not until 1941 that the court interfered with prison officials- for the first time- in behalf of a prisoner.

Cleio Hull, a Michigan prisoner, had attempted to file a writ of habeas corpus with a federal court and prison authorities intercepted the writ to determine if it was "properly drawn." The court ruled: "Whether writ is properly

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drawn or what allegations it must contain are questions for that court alone to determine..." Officials may not abridge prisoner's right of access to the courts. Later courts were to interpret 'access' to mean the right of jailhouse lawyers to help other inmates (*Johnson vs. Avery* 1969); the right of state inmates to sue state officials in federal court (*Cooper vs. Pate* 1964); the ruling that adequate law libraries must be established in all U.S. prisons (*Bounds vs. Smith* 1977) absent other alternatives.

The liberal egalitarian legacy of the Warren court began in 1956 in the case of *Griffin vs. Illinois* in which the court ruled that indigent prisoners must be provided with free transcripts for purposes of appeal. Justice Black, writing the majority opinion, observed: "There can be no equal justice where the kind of trial a man gets depends on how much money he has."

Before the Warren court, the criminal justice protections of the Fourth, Fifth, Sixth, and Eighth Amendments did not apply to state criminal trials; they only applied to federal prosecutions. The Warren court literally made the constitution available to the poor, the underprivileged, the prisoner.

In *Johnson vs. Avery* the court invalidated a Tennessee State Prison rule prohibiting the activities of jailhouse lawyers.

Avery was handed down in 1969 and Justice Fortas held: "the initial burden of presenting a claim to post-conviction relief usually rests upon the indigent prisoner himself with such help as he can obtain behind prison walls. The average prisoner is, effect, denied access to the courts unless such help is available."

In recognizing First Amendment rights of convicts, the court considered also the First Amendment rights of persons to whom convicts were writing. Justice Marshall, in characteristic eloquence, observed in *Procunire v Martinez* (1972): "A prisoner does not shed basic First Amendent rights at the front gate... whether an O'Henry writing his stories in a jail cell or a frightened young inmate writing his family, a prisoner needs a medium for self-expression."

Justice Powell added: "Communication by letter is not accomplished by act of writing words on paper. Rather, it is effected only when the letter is read by the addressee."

In *Bounds vs. Smith* (1977), the court ordered the states to either establish "adequate law libraries" in all prisons or provide inmates with persons trained in the law. The states opted for the former as being the least costly. *Bounds* also holds that inmates at state expense must be provided with paper, pen, notarial services, stamps, and prisoners may not be charged for docket or filing fees. Rehnquist, a Republican - meaning he understands little that hasn't happened before - wrote that convicts, once they have had a direct appeal, have no constitutional right of access to the courts or to mount collateral attacks on their convictions.

Fortunately, Marshall and a slim majority prevailed: "Even most dedicated trial judges are bound to overlook meritorious cases without benefit of an advesary presentations ...Moreover, if the state files a response to a *pro se* pleading, ...without a library, an inmate will be unable to rebut the state's argument."

Bounds, of course, did not provide an immediate panacea. A law library is one thing; for laymen to utilize it is quite another. A clear majority of America's convicts are poorly educated; many are semi-literate, and not a few possess the study habits of Curly, Moe and Larry.

In *Turner vs. Safley* (1987), the Rehnquist court made clear its view of the prison community and the rights of prisoners when the court held that the proper standard for determining whether a prison regulation claimed to infringe on an inmate's constitutional rights is valid, is to ask whether the regulation is "..reasonably related to legitimate penological interests."

The court has armed corrections officials with a convenient catch-all clause that enables authorities to bar any inmate activity (claiming "detriment to security") or censoring political publications deemed "inflammatory."

This "Turner test" will - given the overwhelming conservative majority of the current court - be applicable to prison issues well into the twenty-first century.

The court used the Turner test to restrict "radical" publications in a federal prison. In *Thornburgh vs. Abbott* (1989), the court ruled that an inmate can be prevented from receiving any publication if it is "...detrimental to the security, good order, or discipline of the institution, or if it might facilitate criminal activity."

In *Washington vs. Harper* (1990), the Supreme Court handed down its most dangerous decision: Prison officials may force psychiatric drugs into unwilling inmates.

In 1800 when the Supreme Court moved to Washington, D.C., the honorable justices were so little regarded they were given temporary quarters in the Old Senate Building in an area once used as a janitorial storage room. And for the duration of one full term the United States Supreme Court actually met in a tavern.

When I consider *Washington vs. Harper*, I'm convinced the court still meets in a tavern.

In 1990, while the country was distracted by flag-burning and its resulting constitutional controversies, the court handed down *Harper*, which went virtually undiscussed in both the electronic and print media.

Walter Harper, an inmate in the Washington State Prison system, was several times sent to the states's Special Offender Center, although Harper, convicted of armed robbery, has never been adjudged insane or incompetent. He was forced to take a series of antipsychotic drugs - sometimes called "psychotropics" or "neuroleptics" - that included Trialofon, Haldol, Prolixin, Tarcatan, Loxitane and Navane. These drugs serve to alter the brain's chemical balance and often produce serious side effects. One of the most serious of these side effects is tardive dyskinesia, a neurological disorder, irreversible in some cases, and found to have a frequency rate of ten to twenty-five percent.

Tardive dyskinesia, according to a brief submitted to the court by the American Psychiatric Association, is chiefly characterized by uncontrollabe movements of facial muscles.

Justice Stevens, dissenting in *Harper*, in part, wrote: "The court has undervalued respondent's liberty interest and has concluded that a mock trial before an institutionally-biased tribunal constitutes 'Due Process' of law...Every violation of a person's bodily integrity is an invasion of his or her liberty.

The invasion is particularly intrusive if it creates a substantial risk of permanent injury or premature death."

Harper surely destroys the noble concept contained in *Stanley vs. Georgia*: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."

The court's provision that only a psychiatrist can order forced medication would be amusing it it were not so dangerous. Prison personnel often employ psychiatric "medication" in modifying the activity or energy level of inmates deemed "undesirable." Prison medical staffs are rarely blessed with humanitarians who choose to work in a prison because they are driven by a need to administer to the planet's poor and pitiful. They are all too frequently people who posses neither the ability nor initiative to work "outside" where their performance and efficiency would be subject to close and constant scrutiny.

The court reversed its own ruling in *Vitek vs. Jones* and perfectly conveys the regression of the Rehnquist court. *Vitek* held: "A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement, but it does not authorize the state to classify him as mentally ill and to subject him to involuntary treatment without affording him additional Due Process protections."

There are two dangers inherent in *Harper*. One is the possibility the ruling may extend far beyond prison walls; to sanitariums, nursing homes and hospitals. Forced drugging of the citizenry is not an impossibility. The second danger is the door it opens to medical experimentation and experimental "medical" techniques like aversion therapy, electo-convulsive shock and psychosurgery.

Can one imagine anything more horrible than Orwell's 1984? Yes. It is a group of American prisoners who have been electrically or drug-conditioned to smile rapturously as pictures of Rehquist or Jesse Helms are flashed on a screen.

I have known many condemned men in the prisons of California, Louisiana, Arizona and Nevada. I have worked as death row clerk and I have studied more death transcripts than I care to recall. Like most mortals, the phenomenon of death fascimates me, and I have long considered the legalities of the death penalty.

I oppose capital punishment because we do not have the capacity to make the death penalty "fair"-as the Supreme Court deluded itself it could be made "fair" in *Furman vs. Georgia*. Here "capacity" is the operable word. In a capitalist society, cash is the colossal catalyst.

If two persons are charged with capital crimes, one wealthy, one poor, the quality of justice immediately changes. The wealthy defendant can post bail, hire the attorney(ies) of his or her choice, retain investigators, employ experts to testify for the defense, and postpone the trial indefinitely. The indigent defendant will sit in jail, unable to post bail, and will be represented, invariably, by a public defender who is either inexperienced or burdened by a staggering case load. These are the simple concrete conclusions of economics. I am not interested in the trite moralistic arguments advanced for or against capital punishment nor the vacuous veneer of religious rhetoric; I'm a paralegal, not a priest or philosopher.

Lewis E. Lawes, former warden of New York's Sing Sing prison, wrote: "...not only does capital punishment fail in its justifications, but no other punishment could be invented with so many defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or gallows..."

Former Attorney General Ramsey Clark, wrote: "It is the poor, the sick, the ignorant, the powerless and the hated who are excuted."

In researching a book-in-progress about the history of capital punishment in the U.S.-from the executions of Sarah Good and Sarah Osburn during the Salem Witch Trials of 1691-92 to Ted Bundy's 1989 execution in Florida- I have compiled data on 562 legal executions. I have found but five cases wherein those executed were persons of affluence or influence-and two of these were "convicted" atom spies Julius and Ethel Rosenberg.

Finally, is the Supreme Court itself an unquestionable authority in such a life and death issue? Hardly. The court is in a state of flux; new justices do come and go. It is possible the Rehnquist court will lead us back to the appalling period of *Palko*.

In 1935 Frank Palko was convicted in a Connecticut court of killing a police officer. The jury found him guilty of second-degree murder and sentenced him to life in prison. The state, however, was unhappy with the punishment, and the D.A. appealed on errors prejudicial to the prosecution. The Connecticut Court of Error (was there ever a court more aptly named?) agreed and ordered a new trial. Palko objected on the Fifth Amendment's ban of "double jeopardy." Palko had a point. But Palko was retried and this time Palko was sentenced to death. He appealed to the Supreme Court.

The Supreme Court ruled that Palko was legally sentenced to die because -are we ready, folks?- the Fifth Amendment did not apply to the people of the states.

Justice Benjamin N. Cardozo, writing the majority opinion in Palko, observed: "The Fifth Amendment is not directed to the states, but solely to the federal government." The Constitution begins, "We the people...." What people? The people of Paraguay?

Frank Palko was eventually executed and thirty-two years later Palko was over-ruled in *Benton vs. Maryland* wherein the Warren court declared, "...the double jeopardy clause is fundamental to the American scheme of justice and should apply to the states...in so far as it is inconsistence with this holding, *Palko vs. Connecticut* is overruled."

Frank Palko will be happy to hear that.

Reprinted from *Anarchy*

Biased Hearing Officer Violates Due Process

Robert Ramirez is a federal prisoner. He had been imprisoned at the US Penitentiary in Marion, IL, and had gone through that prison's transfer process and was moved to Leavenworth. While at Leavenworth Ramirez was infracted for involvement in a drug operation and was transferred back to Marion. He filed a habeas corpus petition in the district court claiming that the transfer to Marion and the discipline imposed violated his due process rights. The district court held that no due process liberty interest was at stake and dismissed the petition. The court of appeals for the seventh circuit reversed and remanded.

The appeals court rejected Ramirez's argument that his transfer to Marion violated his due process rights. The court applied the Supreme Court's ruling in *Montayne v. Haymes*, 427 US 236, 96 S.Ct. 2543 (1976), which held that prisoners have no liberty interest as to what prison they are confined in.

Ramirez also argued that because he had "earned" his way out of Marion in 1986, that was an official decision which created a liberty interest in being housed in a less harsh environment than Marion. The appeals court rejected this argument as well by holding that written directives by the attorney general or BOP staff do not create liberty interests or restrictions on prison officials' discretion unless they are issued in accordance with the Administrative Procedures Act.

Ramirez argued that a liberty interest was impaired because the record of the disciplinary hearing would adversely affect his chances of parole and thus result in a longer term of imprisonment. The court noted that while Ramirez is serving a sentence of life plus 99 years he will eventually be eligible for parole. It held that the parole commission would surely consider the infraction and sanction against Ramirez. The magistrate in the lower court had held that it was unlikely Ramirez would ever be paroled in his lifetime. Ramirez objected to this finding but the district court did not conduct a *de novo* review of the issue as it was required to do. The appeals court remanded this issue for a judicial finding of what impact the infraction would have on Ramirez's chances of parole.

The disciplinary board had initially imposed a loss of good time. The report attached as an exhibit before the lower court had the good time forfeiture sanction blacked out. The court ruled that this obliteration was binding on the government and no good time could be taken from Ramirez. The government argued that because no good time loss was involved the disciplinary hearing did not have to comport with minimal due process. The appeals court rejected this argument by holding that even with no good time credits at stake the infraction's adverse impact on Ramirez's parole chances was sufficient to bring his claim within the scope of the federal habeas corpus statute and to require the due process standard of prison disciplinary hearings set forth by the Supreme Court in *Wolff v. McDonnell*.

The appeals court held that Ramirez had made a *prima facie* showing that the disciplinary hearing officer was biased against him because prior to the hearing the officer had threatened Ramirez with being returned to Marion unless he became an informant. The hearing officer did not testify at the evidentiary hearing, but in an affidavit he denied speaking to Ramirez. The court held that this was a disputed issue of material fact requiring resolution by a finder of fact.

The appeals court instructed the lower court to consider appointing counsel for Ramirez. While the quality of the legal papers filed in the case was good, the appeals court notes that this was due to the jail house lawyer who had assisted Ramirez because at the evidentiary hearing it was apparent Ramirez was unable to prosecute his claims. See: *Ramirez v. Turner*, 991 F.2d 351 (7th Cir. 1993).

Lack of Shower/Bathroom Curtains Violate Privacy

Douglas Arey is a Maryland state prisoner. While at a recently built pre release center he complained that the lack of shower curtains and bathroom partitions, which allowed female guards to observe his genitals, violated his right to privacy. Prison officials took no corrective action.

While Arey was using the toilet a female guard observed him from less than a foot away. Arey protested and she infracted him for insolence. She later infracted him for not having his ID badge and for having expired athlete's foot cream. Arey filed suit under § 1983 claiming that the lack of shower curtains and bathroom partitions violated his right to privacy, and that the infraction violated his right to due process.

The district court noted that prisoners "do retain some constitutional right to privacy protecting them against unnecessary exposure of their genital areas to persons of the opposite sex." Weighing the factors set forth in *Turner v. Safely* (the supreme court tests to be used in determining if a federal court will strike down prison rules that violate constitutional rights) the court held that the design of the facility violated the prisoner's right to privacy. The state had not indicated any security interest in not providing privacy in toilet and shower facilities. Moreover, the cost of providing such privacy was minimal. However, the court went on to hold that the defendants were entitled to qualified immunity for their actions because they could not have reasonably known their actions violated prisoner's rights.

The court ruled that because no loss of good time or disciplinary segregation were imposed as punishment for the insolence and failure to possess an identification badge, the due process protections normally applied to prison disciplinary hearings were not applicable.

Because Arey lost 10 days good time and spent 10 days in segregation for possessing the athletes foot cream, due process standards did apply to that infraction. The court held that this infraction was unconstitutional because the rule was too vague and did not adequately apprise prisoners that failure to return medication after its "stop date" constituted a punishable offense. The court ordered that the determination of guilt be expunged, that Arey's good time be restored and that he be reconsidered for reclassification. The court held that the defendants were entitled to qualified immunity for this constitutional violation as well. See: *Arey v. Robinson*, 819 F. Supp 478 (DC MD 1992).

Editorial Comments

By Ed Mead

Welcome to another issue of *Prison Legal News*. This month I want to bring you up-to-date on how we have been doing with our efforts to increase our subscriber base and the number of paying readers. Since last May, every month we have been sending out sample copies of the newsletter to various groups and individuals. The number of free copies mailed each month range from a couple of hundred to well over a thousand. The results of this effort have been encouraging. We have reduced the percentage of free subscriptions from 38 to 27 percent. Whereas before less than half of our readers paid enough to cover our costs of our sending them the newsletter, today 57% have paid the amount per year it costs us to produce and mail the *PLN* to them. Some 16% of our subscribers pay something, less than the amount it costs us to produce mail the newsletter to them. Most of those who pay nothing, or pay an amount less than the cost of production, are prisoners housed in control units or else locked down on death row.

The bottom line continues to be that the paper is paying for itself, as well as for the cost of its continued expansion. Readers should note that not a single penny of the newsletter's money is spent for any purpose other than the direct costs related to the *PLN*. All of the newsletter's money is kept on the streets, in an account managed by our volunteer business manager. He disburses it to our creditors, such as the post office, printing company, etc. No one connected to *PLN* is paid any amount at all, as everything connected with the production process (except for printing, postage, and miscellaneous office supplies such as address labels) is done by volunteers who believe in the correctness of what we are trying to accomplish with this paper.

While we have increased our income levels, our subscriber base has not been growing fast enough. We can bring the cost of production down significantly if we can double our number of readers. Although new readers keep signing on, we also lose many old ones. Those we lose are mostly people who have sent us four or five stamps, so the economic loss isn't significant. Still, it does not hurt us to increase our readership. The cost of printing will go down with the more copies we have printed. To take advantage of this we will need *you* to take active responsibility for signing up new subscribers, either family members or fellow prisoners. Let us know if you need bulk copies of the newsletter to distribute to people. We can send you left over copies for a little more than the cost of postage it takes to mail them to you.

Some people look at *PLN* and see us as being something that would be useful only to jailhouse lawyers or attorneys, and then only for those interested in prisoner rights litigation. This simply isn't true. Every prisoner and family member must be rights conscious. This does not mean you need to know how to file law suits or anything like that. It merely means that by reading *PLN* you are becoming more aware of your rights and the rights of those you love. How can you vindicate a right you are not aware you have? You can't. But once you know about a specific injustice, it is then easier to find a lawyer or some other prisoner to help you litigate the issue. It isn't necessary that you do the legal work yourself.

If there are weaknesses in the paper, or other changes you feel might make us more useful to you and your loved ones on the outside, communicate these criticisms to us. We will include more news and articles of interest to family members if you think that will help. What we will not do, however, is to alter our political biases. We are class conscious prisoners who, unlike the bourgeois media, make no pretense of being objective or neutral. We are partisans for a specific point of view. We are against slavery and support the extension of democracy to all peoples, including prisoners. We believe that the current approach to crime and punishment issues being implemented by the government is counter-productive and actually contributes to the problems it purports to solve. We believe there can be no meaningful criminal justice system without a political system that provides its citizens with social justice. But notwithstanding all of this, we can nonetheless be an outstanding source of prison news and legal information. To be really good, however, we need your help. Write the kind of things you would like to see included and send it to us. Or, if you don't feel comfortable writing an article, just tell us what you would like to see more of in *PLN*. We are open to both your suggestions and your criticisms.

This will be my last editorial comments written from Monroe. The state has seen fit to parole me to my federal detainer, after serving a mere 18 years for an assault in which neither of my police officer victims were so much as scratched. I will be somewhere in the federal system by the time this reaches you. Anyone who corresponds with me, or who has me on the mailing list for any publication, should no longer send mail to the Monroe address. Paul will probably have more for you about this in his editorial comments in next month's issue.

Republicans Introduce Crime Bill

By Paul Wright

In last month's issue of *PLN* I reported on President Clinton's crime bill, which he unveiled at an August 11, 1993, press conference. It turns out that a week before this, with considerably less fanfare, Senate Minority Leader Robert Dole (R-Kansas) and House Minority Leader Michel (R-Illinois) introduced the Republican party's anti-crime package. In many ways it mirrored the democrat's plan.

British writer Graham Greene, in referring to American politics, once commented that the republican and democratic parties were "two empty bottles with different labels." The respective crime bills introduced by each party tends to illustrate this point.

Both plans envision a massive increase in local police hiring funded by the federal government. Both bills expand

the death penalty and limit appeals by death row prisoners and would limit the availability of federal habeas corpus review of state imposed convictions. Both would also promote boot camps for young prisoners using closed military bases for that purpose.

However, the major difference between the two plans is that the republicans want to significantly increase prison space and get the federal government into the prison rent a cell business. Clinton's plan does not address the fact that such a massive police increase will surely result in an increase of arrests, convictions and prisoners. The republicans have given the matter some thought.

The republican bill would deal with the rise in state prison populations in several ways. Grants would be available for prison construction and operation; in addition, the federal government would build 10 or more regional prisons, each with space for at least 2,500 prisoners, and dedicate at least half that space to use by the states in housing certain kinds of prisoners. In order for a state to avail itself of such a prison, its criminal justice system would have to have the following four features: "(1) truth in sentencing with respect to any crime of violence that is consistent with that provided in the federal system in chapter 229 of Title 18, US Code, which provides that defendants will serve at least 85 percent of the sentence ordered; (2) pretrial detention similar to that provided in 18 USC § 3142; (3) mandatory minimum sentences for firearms offenses, career criminals, repeat or chronic sex offenders, and habitual offenders that, in the attorney general's judgement, are satisfactory for law enforcement purposes; and (4) suitable recognition for the rights of victims, including consideration of the victim's perspective at all stages of the criminal proceedings."

While providing more prison space, the bill would attempt to limit the federal courts' use of "cap orders" in prison and jail litigation. By such orders the federal courts "are unreasonably endangering the community," the bill declares. Courts would be forbidden to place a ceiling on a place of confinement as an equitable remedy for conditions violating the eighth amendment "unless crowding is inflicting cruel and unusual punishment on particular identified prisoners." Needless to say, this is a standard that the bill's drafters realize is pretty much impossible to meet.

The bill would also create several new federal crimes. It is readily apparent that these laws are aimed at minority youth in the cities. Modeled on the Racketeer Influenced and Corrupt Organizations Act (RICO), the measure would define "predicate gang crimes" and make it a federal crime to commit such a predicate with the intent to promote or further a criminal street gang's activities or to gain entrance to or maintain or increase one's position in such a gang. RICO itself would be amplified by the addition of several offenses to its list of predicates, including alien smuggling and using minors in a crime. It would also be a federal crime to carry a gun into a school. Penalties would be raised for a number of crimes and restitution would be mandatory rather than within the discretion of the court.

In expanding the death penalty a federal capital murder law would be imposed on the District of Columbia, where citizens recently rejected, by a wide margin, plans to reimpose the death penalty.

What is eventually passed is likely going to include elements of both bills. Attorney general Janet Reno has repeatedly expressed her support for the idea of federal regional prisons to house state prisoners convicted of violent offenses. If past legislative experience is any guide, legislators get into a bidding frenzy of who can be "tougher on crime" by jacking up sentences, building more prisons, etc. This is a lot easier to do than addressing root causes of crime, such as poverty and lack of meaningful jobs. The ruling class is pretty much of the same opinion that there is a need to get bigger clubs (prisons, death penalty, police, etc.,) to beat the population into line. The result is going to be a worsening of the general situation of prisoners, poor people, minorities, etc.

The democrats are determined not to be left behind in the "war on crime." Many people automatically assume that democrats have better views favoring prisoners and criminal defendants than republicans. It is worth noting that liberal democratic Texas governor Ann Richards, darling of the liberal chic, has presided over the execution of more prisoners in her term of office than any other governor in the country since the death penalty was reinstated in 1976. Democratic governor Lawton Chiles of Florida has signed more death warrants than any of his predecessors. Attorney General Janet Reno claims to personally oppose the death penalty yet while a Miami prosecutor sought it in a number of cases. Clinton's own record on this is that he presided over four executions while governor of Arkansas, including that of Ricky Ray Rector, a brain damaged black man. Clinton suspended his campaign and flew back to Arkansas to hold a press conference announcing the execution and how tough he was in not granting clemency. In fact, Clinton never granted clemency to any death row prisoner. The Arkansas prison system is generally considered to be one of the harshest and most brutal in the United States. In short, there doesn't seem to be much to look forward to from Clinton and company.

The main problem with the criminal justice policy "debate" is that it isn't a debate. There is no opposing view. Most importantly, the voices of prisoners, their families and loved ones, who are the most affected by these policies, are systematically silenced and excluded from consideration. The mainstream media also does nothing to afford an opportunity to question or challenge the "lock 'em up" mentality. The public needs to be educated about criminal justice issues so that steps can be taken towards finding solutions rather than peddling the same failed remedies of the past.

Report From The Hole

By Adrian Lomax

The guard stood in the middle of the seg unit, counting. 26 of the 40 cells had the 3x12 inch plexiglass windows in the cell doors covered with paper from the inside. The 5:00 pm count approached, and the guard knew that if the prisoners

kept their windows covered so that they couldn't be seen, the Lieutenant would order the guards to suit up in riot gear to forcibly enter each of the 26 cells to remove the window covering.

The turnkey walked back to the control booth, shaking his head. Five hours and 26 "cell extractions" later, the second shift guards were tired and mad. They put in a lot of work that day.

The whole ordeal could have been averted had the sergeant not decided to cancel use of the segregation law library that evening, apparently for no reason other than to avoid the work involved in escorting prisoners to and from the small room containing law books. In protest, 26 of the seg unit's prisoners decided to "make 'em suit up."

From November to June, I was confined in the disciplinary segregation unit at Wisconsin's Racine Correctional Institution. During that period the prisoners there engaged in numerous collective protest actions in response to mistreatment by the guards. The convicts' weapon was their own solidarity combined with the laziness of prison guards. Turnkeys don't mind suiting up on one inmate, but when they have to perform 15 or 20 cell extractions during one shift, they think twice the next time they consider doing something likely to cause the prisoners to revolt.

The convicts' tactics involved mass flooding of cells, refusing to return meal trays, throwing meal trays off the tier, and the trusty covering of cell windows. On two occasions the full complement of prisoners in the outside recreation cages refused to come inside.

The guards frequently sprayed prisoners with mace and other chemical irritants during cell extractions. In those cases prisoners would try to yank the gas masks off the faces of as many guards as possible when guards entered the cell, exposing them to the chemical agents.

After each cell extraction, guards put the prisoner in a shower stall, allowing him to wash off the chemical agents, removed all property from the cell, cleaned up the chemicals, then put the prisoner back in the cell on "strip cell" status, with no property, no clothing, and no sheets, towels, or blankets. Under Wisconsin law, strip cell status may last no more than three days, but in practice it often lasts longer because it's difficult to get the guards to return one's property. On some occasions, guards' refusal to return prisoners property after three days in strip cell status set off a new round of protests.

At one point prisoners began refusing to stick their hands out to be cuffed while they were in the shower stalls following a cell extraction, bringing a forcible extraction from the shower stalls. Guards responded by refusing to remove handcuffs and leg irons while the prisoners were in the showers. Turnkeys would cut prisoners' clothes off with scissors, put them in the shower stalls in restraints, and remove the restraints only after the prisoners were returned to their cells.

Something that's common in segregation units is guards who act like macho tough guys, continually disparaging prisoners, confident that, since they work in seg, no prisoner will ever be able to lay hands on them. At Racine, Lieutenant Ron Molnar is the archetype of that character. Walking around with his chest stuck out, scowling and shouting insults at convicts, Molnar appears to believe he's John Wayne.

Shortly before I was transferred from Racine, a prisoner named Ervie Gray refused to come in from the recreation cage. Molnar got five guards suited up in riot gear to "extract" Gray. When the goon squad came out of the building, Gray climbed the chain link fence, braving the razor wire, and climbed to the ceiling of the seg building.

After being sprayed with chemical agents, Gray eventually decided to come down. When he started climbing down the fence, however, Gray didn't climb down the side that would have left him inside the rec. cage. Instead, Gray climbed down the side of the fence that put him in the common area, along with Molnar and the other guards.

Upon seeing Gray climbing down the outside of the fence, tough guy Molnar immediately ran into one of the rec cages and pulled the door shut behind him! Even with five guards standing by in riot gear, Molnar wanted to take no chances on Gray getting hold of him.

I'm now confined in the seg unit of the Green Bay Correctional Institution. There isn't the same kind of solidarity among the prisoners here, so collective protests aren't the order of the day. But that's subject to change.

Chained Detainee Wins Restraint Case

At the Madison County Jail in Indiana a pre-trial detainee named Jones became despondent and tried to hang himself, after learning that his four months pregnant girlfriend had taken a job as an exotic "topless" dancer. Jail officials busted Jones and moved him to a barren detox cell, where he was left nearly naked and in a three-way restraint ("hog-tied" with chains) for a week. Jones could not use the cell's toilet facilities so instead he used the drain in the floor he was laying on. He was not permitted any articles for personal hygiene and was not allowed to shower or change clothes. No physician was contacted regarding Jone's attempted suicide or the use of restraints following the attempt.

Jones subsequently filed a civil rights complaint, pursuant to 42 U.S.C. § 1983, claiming that he had a due process right not to be punished, and, since his "restraint" was not related to any legitimate goal and was arbitrary, the court should infer that the purpose of the governmental action was punishment. The district court found in Jone's favor, holding various jail officials were liable for "hog-tying" Jones for such an extended time and for doing so without medical supervision. While the law applicable to the treatment of pretrial detainees (due process) and that which applies to convicted felons (cruel and unusual) is substantially different, this case discussed the former in some detail.

Jones was awarded $5,000 in compensatory damages from jail officials, who were successfully sued in their individual as well as officials capacities. See: *Jones v. Thompson*, 818 F. Supp. 1263 (S.D. Ind. 1993).

The Politics of Imprisonment

By Ed Mead

Peoples' fear of being victimized by crime has steadily risen over the past couple of decades. This has been particularly true for women, the elderly, and minority communities.

While there has always been a substantial amount of crime in the U.S., its general level (rate of crime per capita) and overall intensity (degree of violence) have increased sharply in recent history. Although a portion of this increase is due to population increases and more efficient methods of collecting and reporting crime data, there has nonetheless been a substantial rise in individual victimization levels.

The fear of being victimized by crime is heightened by the sensationalized coverage of criminality by the bourgeois news media and the ranting of law enforcement agencies seeking to further expand their already bloated budgets. Preying on this fear, the overwhelming bulk of bourgeois politicians call for locking up more people for longer periods of time. This is termed "getting tough on crime," and it is an approach that is enjoying widespread public support these days. As a direct result of this policy new prison population records have been set within both the state and federal prison systems.

Sending malefactors to prison creates the illusion that something is being done. The message to the public is that other potential criminals will be suitably deterred from committing similar crimes, and that, at the very least, the recurrence of crime by that particular individual has been temporarily made less likely. Is this necessarily true?

Studies which have compared murder rates between states actually executing their citizens and other states without the death penalty showed that killing those convicted of murder had no deterrent effect. In fact, murder rates slightly increased in some death penalty states. This is because people who commit murder generally do so either out of intense passion or for what crime reporters would call "cold blooded" reasons. Deterrence is not a factor with the former, who simply doesn't care if he or she is apprehended—theirs is a crime of the moment. The latter are not deterred because they believe themselves to be too slick to be caught.

What about the argument that at least those who are locked up are not committing more crimes? This neglects the fact that sending the loser of the court battle to prison changes very little. The murder, rape, extortion, theft, drug use, etc., continues to take place, only now it is happening out of the public's direct line of vision.

If one took the few acres constituting the major penal facility of any state and computed the number of reported crimes committed there per year (the unreported figures would be many times higher), the resulting statistics would show those few acres to be the most densely crime-ridden area of the state. The crimes keep happening, only the victims have changed. Instead of outside citizens it is the younger, weaker, and more vulnerable prisoners who are the most frequently victimized. Because this is taking place behind prison walls, and because it is happening to prisoners (a segment of the population without any democratic rights, and whose status as slaves is legitimized by the constitution's thirteenth amendment), there is little public concern.

There are many other things going on behind those high walls. Of minor importance is the fact that the more experienced prisoners are busily teaching their less sophisticated peers the most advanced criminal techniques. Of greater concern is the continuously unfolding dynamic of what might best be termed the enragement process.

Taxpayers are charged something in the neighborhood of $30,000 per year to incarcerate a single felon in the penitentiary. In exchange for this outrageous sum they receive the same thing they would get by taking a large dog, or any other self-respecting animal, putting it in a tiny cage, where it is kept year after year while sticks are poked in through the bars at it day after endless day. The final result of all that expense is a very alienated and angry animal, who as often as not is bent on revenge.

Once the prisoner is released this rage gets taken out on those nearest him—wife, children, neighbors, and the community in general. The public could have sent the offender to Yale and made a rocket scientist of him for considerably less money, but the logic of building people up rather than destroying them is lost on those who dictate public "corrections" policies.

To add insult to injury, after conditioning people to survive in the unnaturalness of the prison environment, training them to return (the recidivism rate is between 63 and 93 percent, depending on whose figures one reads), the totally unaccountable prisoncrats have the absolute nerve to ask the public for more prisons so they can work their mischief on more people for longer periods of time. What policy makers do not understand is that prisons actually contribute to and worsen the social problem they are supposed to fix.

The ongoing disintegration of international imperialism has unleashed negative social forces which continue to manifest themselves in a number of undesirable ways, including child abuse, wife beating, victimization of neighbors, and countless other acts of "localized" violence by members of the working class against each other. Right now the violence of minorities against themselves has reached alarming proportions.

This same dynamic is unfolding within the nation's prisons as well. It represents an alienated response of the oppressed to racism, sexism, and the economic exploitation of modern day capitalism. It is a response that is not directed or otherwise focused against its real source. It is instead internalized as self-hatred and manifests itself in self-destructive behavior, or expressed externally in the form of criminality against others in the same community.

Meanwhile, those who benefit from our oppression are relatively well protected—they are insulated from the impact of these social conditions. Criminal victimization stud-

ies show that high income white districts have much less crime, both violent and property types, than lower income groups of any other race. Violent crime was 35 times more common in the very low income Black district. Property crimes are also several times higher in poor neighborhoods, even though such offenses are often unreported by poor people.

The most significant cause of what is generally called "street crime" is the inability of capitalism to provide enough opportunities for all of those living under its rule. The unemployment rate for Black youth is today somewhere around 50%. The unemployment rate for adult Black men is two and often three times that for white workers. The unemployment rate for Black women is considerably worse than that of Black men. What is true for Blacks also applies to other oppressed minorities within the U.S., although generally to a slightly lesser degree.

In 1978 Congressman Ron Dellums (D-Calif.) held hearings in Washington, D.C. in an effort to determine if there was a direct relationship between the level of unemployment and the crime rate. The hearings verified what common sense would lead one to conclude: Crime increases with increases in the level of unemployment.

Indeed, Professor M. Harvey Brenner of Johns Hopkins University, testifying before Congress (the joint Economic Committee, Fall, 1979), stated that high youth unemployment is the most significant factor affecting violent crime, because most such crimes are committed by young people. Brenner presented evidence that an increase of 1% in the ratio of youth unemployment of general unemployment during the years 1945 to 1976, corresponded to a 12.2% increase in homicides by those aged 15 to 19 and a 17.2% increase in homicides by those aged 20 to 24. Assault rates increased 6.7% and 7.2% for those same groups, respectively, with the same 1% increase in the ratio. This same finding holds true for rates of mortality, morbidity, suicide, prison admissions, admissions to mental institutions and property crimes.

What to do? We do not possess control of the means of information or education (or any of the other instruments of state power), so at this point there is little we can do on the institutional level to alter the big picture. What we can do, however, is to increase our individual consciousness—to broaden our understanding of the many social problems confronting our communities. Crime, for example, is a force not unlike that of running water or electricity, and like water or electricity it will follow the path of least resistance. There is more crime in poorer communities because it is easier to rob and steal in one's own neighborhood than it is to go to a more prosperous area of town for that purpose.

The ruling class does not want crime to exist, but inasmuch as it is an objective reality that won't go away, they would prefer it be directed against others rather than themselves. By concentrating extra levels of protection around their property (sophisticated alarm systems, private guard patrols, etc.), the rich are able to effectively channel crime back into the poorer communities and other segments of the working class.

It is not being suggested that dangerous criminals, those confused victims of the cruel dog-eat-dog morality of capitalism who act out with violence against other members of the working class, be released to prey on the equally confused but more credulous members of the class residing in the community. What is being said is that people should not fall for the illusion that sending offenders to ever worse prisons for longer periods does any social good. Long lasting social benefits do not flow from maintaining a segment of society in a state of slavery, political disenfranchisement, irresponsibility, and total dependency. You do not get good results by doing bad things, even to supposedly bad people.

There is only one real solution, and that is the establishment of a democratic socialist republic to replace capitalism in America. Only with state power in the hands of a party representing the working class can full employment and social justice be realized. It would be at such a point that prisoners could be genuinely re-educated (made class conscious) and successfully integrated back into an organized and concerned community. New offenders (it will require generations to erase the destructive influences of U.S. imperialism's ideology from society) would not be banished, but strengthened with the support of neighborhood and workplace volunteers who would help to guide his or her progress at home and on the job. Only the most terrible cases would require confinement, and that would be accomplished under humane conditions, with the objective of changing people, and with as much ongoing interaction with the community as possible.

The outbreak of socialist revolution in the U.S. will not happen any time soon. The inherent contradiction between the social nature of production and the private expropriation of the products of that production must continue to heighten and become sharper before workers become conscious of the need for a radical transformation of existing class relations. Given the present low level of consciousness, there is little that can be done in terms of seriously impacting environmental conditions to the point of reducing the size of the next generation of criminals. It is possible, however, to have some small impact on the direction of crime.

Crime already possesses some natural direction inasmuch as 90% of it is aimed against property. Since it can't be eliminated or controlled at this juncture of things, the trick is to try and turn it away from the working class and small business people so that as much of it as possible is aimed at those who created the conditions that allow it to so rapidly spread.

Given the generally low level of the left's development, about all that can be done for now is to try and raise the consciousness of those most likely to offend, the urban poor and those already confined. The message is a simple one—It's not cool to prey on oppressed peoples. This of course being national minorities, women, the elderly, homosexuals, members of the working class, small business people, etc. If class consciousness could be raised even to this modest level of awareness in just a portion of the selected group, a big step would be taken toward making poor and working people feel more secure in their homes and on the streets.

Brazil's Final Solution to the Crime Problem

The American media has recently reported on the massacre of street children in Brazil by policemen paid by merchants to "get rid of" their crime problem. Due to massive poverty there are hundreds of thousands of homeless children in Brazil who survive any way they can, even if it means stealing.

The Uruguayan weekly *Brecha* recently reported that between 1976 and 1990 the military police killed over 7,000 people in Brazil. Of these cases homicide charges were filed in 200 cases and in 198 of these cases the defendant policemen were acquitted of the charges by military tribunals. These figures do not include the killings by the city, state and other federal police forces, nor those of death squads which are usually made up of off duty policemen and soldiers. Diverse human rights groups in Brazil report that not even the recruits in the militarized police escape the brutality and poor treatment by their officers and are forced to serve as drivers, butlers and manual laborers for high ranking officials.

At a recent national congress of military policemen a member said that that organization "defends the improductive plantation system by repressing the landless, marginalizing the popular movements by means of violence and by excluding the poor from recruiting efforts."

It is worth noting that the United States keeps no statistics on how many citizens are killed by its police agencies each year. By contrast, statistics are kept on virtually all other crimes in the United States and such figures are readily available from most other countries, such as Brazil.

Political Prisoner Information Wanted

We are an autonomist collective in Spain. Right now we are working on releasing a compilation tape of music to help fund the distribution of a booklet on political prisoners. We would like to receive as much information as possible from political prisoners and groups that work with and around prison issues and political prisoners so that our booklet will be as complete as possible.

You can write to us in English or Spanish, but we prefer the latter if possible. For more information write: *Fobia, Apdo. 46443, 28080 Madrid, Spain.*

700 Moroccan Prisoners Escape

Close to 700 prisoners of the Utita prison, about 60 miles east of the Moroccan capital of Rabat, escaped on May 22, 1993. The escape took place after the prisoners rioted and burned down virtually the entire prison. The 1,600 prisoners rioted when one of the guards brutally beat a prisoner.

Stop the Forced Psychiatric Treatment of Georges Cipriani!

Georges Cipriani was captured in February, 1987 together with three other militants of Action Directe in France. The French government charged them with several armed actions against the military industrial complex and NATO. They took responsibility for the actions as members of AD.

After their arrest they were totally isolated. They have fought for improvements in their prison conditions with several long hungerstrikes. After a second hungerstrike in 1989 they were able to gain some minor improvements. The two women, Joelle Aubron and Nathalie Menigon, were housed together in a special part of the prison in Fleury and the two men, Georges Cipriani and Jean Marc Rouillan, were housed together in a special part of the prison in Fresnes.

They are held under modified isolation conditions of sensory deprivation similar to those employed in Germany and other imperialist countries in an effort to break political prisoners mentally and physically. The conditions are of total isolation from other prisoners, special cells, continuous lock down, extreme limits on mail, visitors, etc.

After more than two years they stopped their unsucessful chain hungerstrike for better conditions. Solitary confinement is proscribed as torture by several international organizations such as Amnesty International, the United Nations and other groups. Even then French minister of justice Arpaillange called this kind of imprisonment torture. But it is still currently practiced.

Georges Cipriani was sent from the prison at Fresnes to the closed ward of the psychiatric hospital at Colin-Villejuif on June 15, 1993. He is being forcibly "treated" with psychotropic drugs against his will.

The responsible doctor ordered a total contact ban for the first nine days and total isolation from other patients. Georges was not allowed to receive any visits from friends, family or his attorney. He was not allowed to receive mail and until now has been confined in an empty cell (no newspapers, no books, no writing materials, etc.). At the time of the contact ban Georges was forcibly injected with 150 mg of the psychotropic drug *Loxapac* a day. Since June 24, 1993, he is allowed to walk in the prison courtyard everyday and eat with the other patients.

An attorney visit that was planned for June 24, 1993, was allowed by the Prefecture (the district administration and security authorities responsible for compulsory hospitalization).

In the meantime the dosage of the same psychotropic drug was increased to 400 mg a day. This is an extremely high dosage. After several policemen roughly tried to prevent the lawyer from visiting Georges at the doorway of the hospital, the attorney was able to talk with Georges for the first time.

The visit showed that he is suffering from the typical consequences of such compulsory hospitalization. He is unable to remember anything in the immediate past. He is unable to understand why he is in the psychiatric hospital to begin with. It is hard for Georges to formulate a goal for himself and not fall into indifference.

Two months before his forced hospitalization Georges learned that his mental and physical health was adversely

affected by the conditions in the jail at Fresnes. Since May of 1993 he tried to have a critical look at his situation with some close friends and visitors in order to offset this development. But the restricted visiting possibilities and his permanent placement in the isolation control unit made this impossible. Until now it has not been possible to discuss the situation with him due to the intervention of the responsible doctor and the ensuing contact ban.

Until now it has not been possible for a doctor who has Georges' confidence to visit him. Such a visit is the indispensable prerequisite for further steps to treat Georges. Due to the collusion between the psychiatric and security forces it is not possible to obtain permission for friends and family members of Georges to visit him. This procedure means that the measures taken against him after his arrest continue in order to destroy him mentally and physically.

The current forced hospitalization is certainly not the treatment that Georges needs to come to terms with his situation and the consequences of continuous solitary confinement. For any treatment to succeed it has to be free and voluntary. This hospitalization means that the consequences of solitary confinement are being muffled and individualized with chemicals in order to place Georges back into the same prison conditions that caused the problem to begin with.

It is of the utmost importance that people protest the treatment of Georges. One of imperialism's dirty little secrets is the large number of political prisoners it holds in its prisons. They are held in harsher, more punitive conditions than social prisoners, usually with longer sentences. The purpose of these conditions is to destroy them as individuals and members of the movement for social change that they represent. The mainstream "human rights groups", like Amnesty International, etc., have a pro-imperialist bias that does not recognize political prisoners in the imperialist countries. Because militants like Georges do not renounce the people's right to self defense they are not even considered "political prisoners" by AI and such.

Please write and demand that Georges forced hospitalization stop at once; that Georges be permitted treatment by a doctor of his choice; unlimited visits with friends and family and creating conditions which make it possible for Georges to come to terms with his situation and the consequences of long term isolation.

Write, fax, phone your protest to the Prefecture which is responsible for administrative and security tasks and the doctor in attendance, Dr. Robbe:

M. le Prefet du Val de Mame
7, Ave. du General de Gaulle
F 94011 Creteil CEDEX,
France
Tel: 00331/49566053,

Dr. Robbe
Centre Henri Colin
54, Ave. de la Republique
F 94800 Villejuif, France
Tel: 00331/455957

Monsieur Laroche
Chef du Cabinet du Prefet
Fax: 00331/49566404

Donations for legal fees and expert testimony can be sent to: W. Kronauer, Sonderkonto "Georges", Postgiro Frankfurt/Main, BLZ 50010060, Germany, Kto. Nr.: 0264059-609

For more information, updates, etc., contact: Fruende de Politischen Gefangenen in Frankreich, C/O Info Buro, Am Landwehrplatz 2, 66111 Saarbrucken, Germany, Tel: 0681/399990

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Gender Based Treatment Disparity Violates Equal Protection

Inferiority of Programs at Women's Prison Successfully Challenged

By Ed Mead

If you are a woman and you break the law in Nebraska, and if you are required to serve a prison sentence, you will be sent to the Nebraska Center for Women (NCW). NCW is located in York, a small town located about 100 miles from Omaha. It's the state's only prison for women. Prisoners at NCW filed a class action civil rights complaint alleging that the programs and treatment accorded to female convicts were inferior to those available at men's prisons, and that this disparity violated the equal protection clause.

The case was a complicated one. The district court's opinion is 95 pages long. The trial lasted for a month, there were 5,450 pages of transcript, and more than 350 pages of post trial briefs. The judge was being asked to rule, in terms of programs and services, whether female prisoners have been given a fair share by Nebraska prison officials when compared to male prisoners. The answer to that question was no.

There were a number of preliminary questions to resolve before addressing the substance of the plaintiff prisoners' equal protection claim. Were female prisoners "similarly situated" to male prisoners, did the "heightened scrutiny" test apply to this equal protection case, and did legitimate governmental interests override the constitutional violation? The court answered each of these threshold issues in favor of the prisoners. Still, women prisoners seeking to initiate similar litigation must be familiar with these seemingly unrelated aspects of the law surrounding the equal protection clause.

The court tried to lean over backwards to accommodate prison officials. The plaintiff women pointed out, for example, that some male prisoners of the penitentiary were permitted to leave the security perimeter to perform their state paid work assignments, yet female prisoners at NCW, who had similar minimum custody status, were not permitted outside the security perimeter. The judge acknowledged the disparity, but dismissed it as "inconsequential" and "an area where legitimate security... concerns... are implicated."

Pay: Other issues could not be so easily swept under the judicial rug. Women at NCW were paid on an hourly basis for their state paid work assignments. If they worked for an hour they were paid for an hour. In contrast, male prisoners at the Nebraska State Penitentiary (NSP) were paid for a day's work even if they only worked 15 minutes. The net impact was that females received substantially less than males for comparable work. The court held this disparity violated the equal protection clause of the fourteenth amendment.

Education: Men at NSP could receive an accredited on site post-secondary education program, consisting of between 14 and 17 separate courses, that could lead the male prisoners to a certificate, associate degree, or diploma in business administration. Men could also receive college instruction by correspondence courses. During the same time frame, women could only get correspondence courses. The court ruled this difference in treatment violated the equal protection clause.

Vocational Training: The district court judge held that women at NCW "were substantially burdened because they lacked the range of options that were made available to the men in vocational education." Women had only one course to choose from (clerical arts), and they could not receive college credit or a degree for pursuing that program. Whereas men had two courses to choose from (culinary arts and welding), which could be taken for college credit and a degree earned. This difference in opportunity also violated equal protection.

Preemployment Training: Prisoners working in correctional industries were subjected to disparities in preemployment training on the basis of gender. Males working in the sewing factory received better quality training than their female counterparts, and women working in the data-entry program received no preemployment training at all. It was held that these differences also violated the constitution.

Prerelease Program: Prerelease programs are designed to prepare prisoners for reentry into society. Men at NSP have access to an extensive and ongoing prerelease program, which is taught four days a week, for nearly three hours a day, for five weeks. There was a similar program for women at NCW, but it has not been offered since 1988. The judge ruled that the failure to provide a regularly scheduled prerelease program for women, comparable to that accorded to men at NSP, violated the equal protection clause.

Law Library Contents and Hours: For a substantial period of time, the law library at NCW did not contain important tools for doing basic legal research. It did not, for example, contain a "Shepard's" citator for Nebraska or even federal cases. Not only was their law library far smaller and less outfitted than the one NSP men had, women had significantly less time to use the law library than their male counterparts. The state argued that the NCW law library met the due process

Continued on next page...

requirements of *Bounds v. Smith*, 430 US 817, 97 S.Ct. 1491 (1977). The court replied that "even if true, such an assertion is simply not responsive to the equal protection challenge of the NCW inmates." The judge went on to hold that "the law library was housed in such a small room that it precluded meaningful use of the library, in contrast to the adequate facilities enjoyed by the men at NSP." The court ruled that the research tools were inadequate and the hours of operation less than a third of the scheduled hours available to men at NSP. The court also held that women held in segregation were denied their right of access to the courts by denying them direct access to the law library and the assistance of a trained legal aide.

This case goes on to hold that medical and dental practices, mental health practices and the recreation program violated the equal protection clause. To deal with each of these issues in turn would unduly lengthen this report; there is, however, one aspect of the case every reader should study in more detail, particularly our women comrades. And this had to do with Title IX of the Education Amendments of 1972, prohibiting sex discrimination in educational programs receiving federal financial assistance. Title IX applies to prison educational programs as well. This case should be studied, and once proper investigation has been done, similar suits should be initiated in other states. Nebraska treated its female prisoners no worse than most other states. This type of gender based discrimination is both extensive and widespread. It must be challenged.

Women prisoners interested in investigating the possibility of filing an equal protection complaint in their respective states can contact the attorneys representing the prisoners in this case, asking them for a copy of the original complaint. The names of the attorneys are listed at the beginning of the opinion. See: *Klinger v. Nebraska Dept. of Correctional Services*, 824 F. Supp 1374 (D Neb. 1993).

Retaliation for Legal Action States Claim

Eric Schroeder is a Hawaii state prisoner. While at a minimum security prison he was assigned to a work crew under the supervision of a guard he had previously sued. Schroeder claims that the guard threatened him, used anti-semitic slurs and falsely infracted him in retaliation for the previous suits. Schroeder also filed complaints that the facility's law library was inadequate, that heating in the segregation unit was inadequate and that the prison disciplinary committee had reinstated disciplinary charges it had previously dismissed.

Schroeder filed suit in federal court on eleven separate causes of action. These included that he had been retaliated against for having filed law suits, that he was transferred to another prison in retaliation for having complained about the inadequacy of the law library and for exercising his constitutional right of access to the courts. The district court granted the defendants motion for summary judgement in part and denied it in part.

The court dismissed Schroeder's claims against the guard who used the anti-semitic slurs by noting that, while reprehensible, such behavior does not violate the constitution.

The court held that Schroeder had, however, stated a first amendment claim by alleging he was retaliated against for his legal activities. The court gave a detailed discussion of the basis for prison retaliation claims in the ninth circuit. The court ruled "Prisoners have a specifically protected first amendment interest in pursuing civil rights litigation." While a section 1983 retaliation plaintiff must allege that the retaliatory action was taken in retaliation for the exercise of a constitutionally protected right, the plaintiff need not allege that the resulting damage protected a constitutionally protected interest. "The sole question is whether the action in question was taken in retaliation for the exercise of an inmate's constitutional rights." The court held that Schroeder not having a right to be free from harassment or to remain at any given prison was immaterial to the retaliation claim. Because the law on retaliation is so clearly established the defendants were not entitled to qualified immunity on this issue.

The court cites extensive case law that holds that while prisoners have no right to remain at any given prison they may not be transferred to another prison in retaliation for the exercise of constitutional rights. The court held that Schroeder had set forth a chronology of events and sufficient evidence to require a trial on this issue. The court denied the defendants qualified immunity on this issue as well.

The court held that Hawaii prison regulation 493.18.01-493.18.03 concerning classification creates a due process liberty interest enforceable in federal court under section 1983. The policy states that prisoners must be classified according to the risk level that they represent. See: *Schroeder v. McDonald*, 823 F. Supp 750 (D HI 1993).

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Prison Medical Treatment Law Explained

A Pennsylvania state prisoner brought a 42 U.S.C. § 1983 complaint against a prison doctor and hospital administrator, alleging that the medical treatment provided to him violated the eighth amendment to the U.S. constitution. The defendant hospital workers moved to dismiss the complaint pursuant to Rule 12(b)(6), Fed.R.Civ.P. Even though the *pro se* plaintiff did not submit a response to the motion to dismiss, the district court nonetheless denied the motion.

The judge noted that under the eighth amendment, prison systems have a constitutional duty to provide prisoners with adequate health care. However, mere allegations of negligent medical malpractice do not present a constitutional violation. In order to succeed in a § 1983 action claiming inadequate medical treatment, a prisoner must show more than negligence on the part of a prison doctor. He must show that the doctor exhibited "deliberate indifference" to a prisoner's serious medical need.

In the instant case the prisoner alleged that he reported to sick call at SCI Graterford seeking a "special diet" for medical reasons, and the doctor who saw him should have known that according to the plaintiff's prison medical records, he suffered from ulcers and torn tissues in his stomach. The defendant doctor refused the plaintiff a special diet for eighteen months, which demonstrated deliberate indifference to the prisoner's serious medical needs.

The state, in its motion to dismiss, challenged the adequacy of the complaint in three regards: (1) with respect to the charge of deliberate indifference; (2) that the plaintiff's medical need was not serious; and (3) because the complaint was not pled with sufficient factual particularity. As noted earlier, the court rejected each of these contentions.

The defendants first argued that the complaint should be dismissed because it did not allege facts supporting the conclusion that they acted with deliberate indifference. The court held that the complaint alleged that plaintiff suffered from ulcers and torn tissues in his stomach and that defendants knew he so suffered. The judge went on to say it can reasonably be inferred from the complaint that a special diet was required for the treatment of the prisoner's stomach problems, and that the defendant hospital workers refused to put plaintiff on a special diet in spite of the fact they knew it was necessary for the prisoner's health. "This is more than a mere allegation that defendant negligently chose the wrong course of treatment. This is deliberate indifference," the court said.

The state next argued that even if the complaint adequately alleged deliberate indifference, the medical need in question was not a "serious" one. "Perhaps if plaintiff alleged that he had a hangnail or a minor scratch that was deliberately left untreated," the court responded, it could be found "that his medical need was not serious. However, a prisoner need not suffer physical torture or a lingering death as a result of a prison's denial of medical treatment in order to come under the protection of the eighth amendment." The judge speculated on what could happen if plaintiff's condition was left untreated, then said it could not find as a matter of law that ulcers and torn stomach tissues are not a serious medical need.

Finally, the lawyers for the doctors argued that the complaint should be dismissed because it did not allege facts with sufficient particularity. For example, the complaint did not provide specific dates upon which medical treatment was requested and denied. The court ruled that the complaint satisfied the requirements of Fed.R.Civ.P. 8(a)(2), and that the defendants can get specific dates and such through the usual mechanism of discovery.

As the reader may have gathered, in this case the court bent over backwards to accommodate the prisoner, whereas in most such cases the judge will generally do back-flips to accommodate the state. The message here is that complaints for deliberate indifference claims must be pleaded in some detail, deliberate indifference established, and a serious medical need shown. See: *Coades v. Jeffes*, 822 F.Supp. 1189 (E.D.Pa. 1993).

Damages Awarded to Paraplegic Prisoner

Robert Hicks was a pretrial detainee in the Jefferson County jail in Kentucky. He attempted to escape by climbing out of a window, his rope broke and he was severely injured in the resulting fall. After a stay in the local hospital he was returned to the jail, bedridden and paraplegic. He was initially placed in a special room in the jail's basement where he did receive adequate medical care.

A few months later Hicks was placed in an isolation cell as punishment for his escape attempt, despite the fact he was unable to walk. Hicks claimed he was deprived of drinking and bathing water, proper physical therapy, proper kidney stone treatment and was made to lie in his own vomit and feces for extended periods of time. He also claimed guards would kick his door in the middle of the night, that he could not reach the emergency button in his cell, for two months he was not turned in his bed and had to rely on a fellow prisoner for aid, he was denied a wheelchair, his soiled linens were not changed and he was denied prompt procurement of prescribed prosthetic devices.

Hicks filed suit and the case went to trial before a jury. The jury awarded Hicks damages of $10,000 against the jail warden, $1,000 against the jail nurse and $60,000 against the jail's medical services contractor, CMS. The district court granted judgement notwithstanding the verdict to the contractor. All parties appealed and the court of appeals for the sixth circuit affirmed.

The court gave an explanation of the principles of liability in medical indifference cases. Noting that officials can be liable for failing to supervise or control their subordinates upon a showing that the official either encouraged or participated in the act. "At a minimum a plaintiff must show that the official

Continued on next page...

at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending officers."

While there was no evidence that the warden had personally observed Hicks' conditions, or ordered his employees to withhold medical care, the court held that inconsistencies in his trial testimony could lead a jury to believe he knew more than he claimed. This was sufficient to uphold the finding of liability against him. The appeals court also upheld the finding of liability against the nurse who refused to treat Hicks. Both defendants knew Hicks had special medical needs and did nothing to ensure he received proper medical care.

The court noted that contracted medical care providers can be sued under § 1983. The court affirmed dismissal of the verdict against CMS because there was no evidence of any decisions by CMS to deny Hicks medical care. CMS was not the final authority on medical services provided, this function is carried out by the fiscal court of each county in Kentucky. The court notes that Hicks made no attempt to demonstrate the nurse was following a CMS policy or custom in her acts and omissions against Hicks. Thus, CMS was properly entitled to dismissal of the verdict against it. See: *Hicks v. Frey*, 992 F.2d 1450 (6th Cir. 1993).

Lead Poisoning

By Ronald Ronniel Wren

There is no proper way to explain how vital "lead poisoning" is without causing alarm. I am writing this in the hopes that prisoner advocates will step forward and explore the lead poisoning problem in the institutions in which they are presently incarcerated. If there are any unanswered questions after you read this, please contact me.

My intentions are to give you enough information to investigate the possibility of your institution poisoning prisoners, when they know or should have known that lead plumbing is installed in that institution, yet they have done nothing to correct the problem since 1974. If the prison that you are incarcerated in was built before 1974 then there is a 100% chance that it contains lead in the plumbing system. However, if this briefing is followed closely, you can file with the Environmental Protection Agency (EPA).

Lead poisoning is a time bomb in any correctional institution in the US because it goes undetected. Those placed in authority to run a check and balance are directly tied in with those in authority to keep us confined in these hell holes; therefore, no real concern is shown towards this issue.

My suggestions are to obtain some form of support on the outside before taking any corrective action because the prison officials will surely lay down the normal rules in placing you on immediate transfer and segregation status. Play it safe and contact your outside connections for support with the facts your investigation turns up.

If you contact the local media, be sure that town, city or county does not supply water to your institution; if so, go outside that area. On the other hand, if your institution has its own treatment plant and water tower, go for it. This is a hot issue and it is a very deadly issue. Prisoners have been dying at alarming rates at this institution (Galesburg, IL) from cancer; maybe the water caused it, who is the wiser? Even though I cannot prove that these deaths are a result of lead poisoning through the water system, I can prove that for the past four years lead has been over the EPA standards by at least 31%.

Lead is found in the pipes of the institution you are incarcerated in through the water system that pumps the water (water station) to the institution. These pipes could be lead, or welded together with lead rods. However, the contents of lead are usually found in hot water. This is because hot water helps the flow of lead in its transition into the institution through the plumbing system. If your wash basin shows an off white color that cannot be scrubbed off with cleaning supplies, or if a green substance is evident, you equally have problems with an overdose of lime.

By lead rods being used to weld pipes together, and a vast amount of institutions being built before 1974, the flow of lead is astronomical compared to the requirements of the EPA. According to the EPA, the standard lead level is 15 parts per billion. *Federal Water Pollution Control Act*, 33 U.S.C. § 1251, et seq, but see 33 U.S.C. § 1251(g). Lead is also contained in storage batteries, enamels, glazed pottery, lead glass, lead arsenate, tetraethyl lead (used in gasoline compound additives), welding and riveting. The water may even be stored in lead water towers or containers used to boil hot water, or any other source where the hot water is boiled. The treatment plant, whether institution, town, city or county owned may be the major source if your area has a high lead content of over 15 parts per billion.

In 1986, Congress banned the use of lead solder containing greater than 0.2% lead, and restricted the lead content of faucets, pipes and other plumbing materials to 8.0%.

When water stands in lead water pipes or plumbing systems containing lead several hours or overnight the lead may dissolve into your drinking water. This means the first water drawn from the tap in the morning, or later in the afternoon, can contain fairly high levels of lead.

Convicts are being exposed to lead poisoning at alarming rates due to many prisons being built in the early 1900's, when mostly lead pipes were used. Lead poisoning results when excessive amounts of lead are absorbed into the body. This excessive absorption rate slows up many normal chemical processes in the metabolic system because the enzyme systems (speeding up specific chemical reactions) are inhibited. This condition of poisoning or intoxication is also known as "plumbism" (lead poisoning) or "saturnism" (chronic lead poisoning). Medical authorities differ as to what constitutes an excessive amount of lead in the human system. Some authorities maintain that amounts in excess of 0.08 milligrams of the metal in 100 cubic centimeters of whole blood suggest lead poisoning. Other authorities maintain that amounts up to 0.10 milligrams per cubic centimeter of whole blood are normal.

Any lead absorbed in your body is generally deposited in your bones, where it is retained without perceptible harm to the body. Excessive quantities of lead cannot be absorbed and stored in a relatively safe manner. The excess metal then circulates in the bloodstream and produces serious disabilities such as acidosis (an abnormal condition in the body). Dehydration or starvation tend to mobilize or remove this lead from the bones into the bloodstream, producing lead poisoning.

In addition to lead encephalopathy (a disease of the brain), in a few cases lead poisoning usually produces some or all of the following symptoms in adults: colic (severe, recurring abdominal pains); wrist drop resulting from a direct effect on the extensor muscles of the forearm and from paralysis of the radial nerve controlling the extensor muscles; weakness, anorexia (loss of appetite); loss of weight, constipation; painful joints with rigidity and cramps; yellow and jaundiced complexion; nausea, fatigue; nervousness and giddiness.

Adult lead poisoning is of two types: acute (short term over-exposure) and chronic (long term over-exposure), which is vital. Chronic lead poisoning is sometimes also called plumbism. However, the two terms are not mutually exclusive; acute symptoms may occur in persons newly exposed or in someone chronically exposed who absorbs increased amounts of lead, thereby causing the sudden appearance of symptoms. D. Poskanzer, *Heavy Metals*, in *Harrison's Principles of Internal Medicine*, 1274, 1276 (10th Ed. Petersdorf, et al., 1983).

As of 1985 the Centers for Disease Control (CDC) recommends initial screening for elevated levels of erythrocyte protoporphyrin (EP) (a mature red blood cell that normally does not have a nucleus, very small, which carries oxygen to the body tissues).

The kidneys are damaged when large amounts of lead are absorbed. This is irreversible. Lead induced kidney injury (lead nephropathy) results in the abnormal presence of glucose, amino acids, albumin (any of the group of proteins found in milk, egg, muscle, blood and in many vegetable tissues and fluids), and red blood cells in the urine or elevated levels of substances normally found in the urine, such as phosphates. Elevated excretion of a substance in the kidneys may result in a lowered level of the substance in the blood. On the other hand, substances normally removed from the blood by the kidneys, particularly nitrogenous compounds and urate (salts or uric acid), may accumulate in the blood, excessive uric acid in the blood may result in gout, which is otherwise rare in cases of chronic kidney failure. If exposure continues long enough, the kidneys may become greatly reduced in size. Hammond, *Exposure of Humans to Lead*, 17 *Annual Review of Pharmacology and Toxicology* 207, 208 (1977).

If you or any other prisoners have the following symptoms: Severe abdominal pains, weakness and fatigue, loss of appetite, constipation, painful joints, headaches, inability to sleep, irritability, nervousness, depression, giddiness, confusion, lack of muscular coordination, visual disturbances, nausea and vomiting, metallic taste in mouth, bluish line on gums at base of teeth, it is highly recommended that you consult with a doctor for further testing.

Treatment of lead poisoning consists of firstly removing the victim from further exposure to lead and secondly, if necessary, administering chelating agents. At the present time, three chelating agents are in general for use in treating lead poisoning. CaNa2EDTA (Calcium disodium edetate, trade name Versenate), BAL (dimeercaprol, trade name British antilewisite), and d-penicillamine (PCA, tradename Cuprimine). Of these three, Versenate and Cuprimine are capable of being used alone, although curpimine is classified as an investigational drug when used to treat lead poisoning, while BAL is used only in combination with Versenate and only in serious cases.

Even though I have no proof of lead being able to surface in your hot pot, if you clean it and there is a hard crusty substance left that you have problems getting off, it could be lead and you should make it a point to contact the EPA. Make sure when you write them that you give them the facts to conduct tests on. For example, if you know of a water outlet or drinking outlet where water tastes unusual, direct the EPA's attention to those outlets as well as the cells and not the administration building.

As stated earlier, I am incarcerated but you should have means of writing. I assure you I will contact you at the earliest possible convenience. [***Editors Note**: Illinois does not allow prisoners to directly correspond with each other.*]

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Segregation of HIV+ Prisoners Upheld, Again

James Camarillo was an HIV positive California state prisoner. He has since been released on parole. While in custody of the California DOC he was transferred to a housing unit of HIV+ prisoners. Camarillo filed suit under § 1983 claiming that the transfer violated his right to equal protection, privacy, due process, freedom from cruel and unusual punishment and freedom of association. On the defendant prison officials' motion for summary judgement the district court dismissed the first four claims holding that they were entitled to qualified immunity for their actions. The court did not address the issue of qualified immunity on the freedom of association issue and ordered the case to proceed to trial.

The defendants filed an interlocutory appeal claiming that they were entitled to qualified immunity on this issue as well. The court of appeals for the ninth circuit agreed and reversed and remanded the case.

The defendants did not raise qualified immunity as an affirmative defense in their answer to the complaint. The appeals court notes that qualified immunity is an affirmative defense that should be plead by the defendant in his or her answer to the complaint. However, in the absence of a showing of prejudice, an affirmative defense can be raised for the first time on summary judgement. Because Camarillo did not claim any prejudice the court ruled that the defendants had not waived their qualified immunity defense.

The court gave a brief description of the doctrine of qualified immunity and notes that the plaintiff in a § 1983 action bears the burden of proving a right was clearly established at the time of a government officials allegedly unconstitutional conduct. In this case, the court held that the district court should have entered summary judgement for the defendants as soon as it determined no clearly established right had been violated.

The court noted that every court that has considered the question of segregating HIV+ prisoners has upheld the practice. The cases are cited in the opinion. In this case the constitutionality of segregating HIV+ prisoners was not before the court. Without reaching that question the court dismissed the suit on the matter of granting qualified immunity to the defendants. See: *Camarillo v. McCarthy*, 998 F.2d 638 (9th Cir. 1993).

Nearly Third of All Prison Deaths Due to AIDS

More than half the prison inmates nationwide who died from AIDS in 1991 were in New York and New Jersey, where widespread drug abuse has caused much of the disease's spread, a government study said.

Two thirds of the prisoner deaths in New York and New Jersey prisons that year were from AIDS, said a study issued by the Justice Department's Bureau of Justice Statistics.

The AIDS deaths among prisoners in both states appears to reflect widespread intravenous injection of drugs among males in New York City and neighboring cities, said Dr. Mervyn Silverman, president of the American Foundation for AIDS Research.

In 1991, 210 of the 318 prisoner deaths in New York state were the result of AIDS, the study said. Of prisoner AIDS victims, 199 were men and 11 were women, the study found.

In New Jersey that year, 66 of the 96 prisoner deaths were attributed to AIDS. All the AIDS victims were male.

Florida ranked third with 59 AIDS deaths among prisoners, followed by 38 in California, 19 in Pennsylvania, 18 in Texas, 14 in both North Carolina and Maryland, 13 in Georgia, 12 in South Carolina, 11 in Connecticut, 10 in Illinois and 8 in Massachusetts.

In Washington state none of the 9 prison deaths in 1991 were attributed to AIDS. The study found that 528 of the 1,863 prisoner deaths in 1991 were due to AIDS. All but 15 of the AIDS victims were men.

That figure is more than double the 254 AIDS caused deaths recorded in the nation's federal, state and local prisons and jails from November, 1985, through September, 1986, according to a 1987 Justice Department study.

Seattle Times, Sep. 13, 1993.

BOP Must Disclose Medical Records

Two federal prisoners requested that the Bureau of prisons (BOP) provide them with copies of their medical records. The BOP refused to provide the requested files in their entirety. Both prisoners separately filed suit under the Privacy Act (PA), 5 U.S.C. § 552a and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, to obtain the documents. The district court granted the government's motion for summary judgement holding that the prisoners weren't entitled to disclosure of the files. The court of appeals for the District of Columbia circuit reversed and remanded.

The appeals court notes that this case turns on the propriety of the Justice Department's regulations concerning the manner in which agencies will disclose medical records, 28 CFR § 16.43(d) (1992). The regulation in question provides that when a person requests medical records pertaining to themselves, that are not otherwise exempt from individual access, the Department of Justice (DOJ) agency can require that the records will only be provided to a physician, designated by the requestor, who requests the record and establishes his or her identity in writing. The designated physician shall then determine whether or not to disclose the records to the requestor.

The appeals court agreed that this regulation was not a permissible interpretation of the PA. Disclosure to a third party does not satisfy the government's obligation to release the files directly to the requestor. "A regulation that expressly contemplates that the requesting individual may never see certain medical records is simply not a special procedure for disclosure to that person."

Noting that one of the plaintiffs had been seeking his medical records for more than six years, the appeals court ruled that the records should be disclosed promptly. While invalidating the above rule, the court held that the BOP was still entitled to fashion a "special procedure" for the disclosure of medical records, consistent with their opinion that the records are actually disclosed to the requestor.

The court also instructed the government that on remand it was not free to claim that the plaintiff's records fell into the PA's statutory exemptions because the BOP had contended throughout the litigation that none of the records were exempt from disclosure. "...the government is not entitled to raise defenses to requests for information seriatim until it finds a theory that the court will accept, but must bring all it's defenses at once before the district court." The court decided the case solely on PA grounds and did not address the FOIA grounds. See: *Benavides v. U.S. Bureau of Prisons*, 995 F.2d 269 (DC Cir. 1993).

Washington Civil Commitment Law Upheld

The Washington State "Civil Commitment" law was upheld by the Washington Supreme Court In Re Young, Wash Sup. Ct, No. 578637-1, 8/9/93. In this case, the sexually violent predator provisions of the 1990 Community Protection Act, RCW 71.09, are challenged by two people who have been civilly committed under it. A "sexually violent predator" is someone "who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence." Crimes of sexual violence are listed in the statute, and include some not usually considered sex offenses if they are determined beyond a reasonable doubt to have been "sexually motivated." "Predatory" acts are those directed at strangers, or individuals chosen by the offender for the purpose of victimization.

Under the statute, when a person's sentence for a sexually violent offense has expired or is about to expire, the state is authorized to file a petition alleging the person to be a sexually violent predator. A judge must determine ex parte if "probable cause exists to believe that the person named in the petition is a sexually violent predator." When probable cause is found, the person is taken into custody and transported to a facility for evaluation. Within 45 days, the court must conduct a trial to determine if the person is a sexually violent predator. Either party, or the court, may demand a jury trial.

The burden is on the state to prove that the detainee is a sexually violent predator. If so, then he or she shall be committed to a facility "for control, care, and treatment" until "safe to be at large." The statute limits treatment centers to mental health facilities located within correctional institutions.

The petitioners argue that the statute violates the double jeopardy clause and the prohibition against *ex post facto* laws.

Generally, these statutes apply to criminal matters. Thus, if the statute is civil rather than criminal in nature, the statute survives this challenge.

The court held that even though the scheme does involve an affirmative restraint (the "committed" are held in a special wing of the DOC's Special Offender Center in Monroe, a prison), the civil commitment goals of incapacitation and punishment are distinct from punishment. The court held that because the person is committed due to a "mental abnormality" this is civil, not criminal in nature. Readers should note that in *amicus* briefs filed by the American Psychiatric Association they noted that there is no known medical condition which defines or distinguishes sex offenders.

In its lengthy opinion the majority upheld the statute finding it does not constitute preventive detention. They came to this conclusion because the state must prove a person is sexually dangerous before they can be committed. However, the state is proving this dangerousness based on the persons prior criminal record. In this case the court ordered the release of one defendants who had been arrested and committed after being out of prison for several months with no indication he was, in fact, dangerous. Prosecutors have responded to this by saying

they will seek civil commitment before prisoners are released from prison, thus closing this "loophole".

Among the interesting applications of this law has been the state Parole Board releasing prisoners (to do so the board must find they have been "rehabilitated" and pose no threat to society) whereupon local prosecutors take the person into custody and begin civil commitment proceedings.

The best understanding of the case is given by the dissent in its' opinion. They would find the statute unconstitutional and violative of the due process clause by creating "dangerousness courts" where people are imprisoned for crimes they have yet to commit.

To date no one committed under the law has been found releasable. This law basically authorizes the life time imprisonment of individuals for the crimes they might commit in the future. All of the committed were committed after they had served prison sentences on their criminal convictions. Ostensibly the purpose of the commitment is for the prisoner to get "treatment" for their "mental abnormality", yet this begs the question of why didn't they obtain "treatment" while serving their criminal convictions in the regular DOC prisons? See: *In Re Young*, 122 Wn.2d 1 (1993).

No Witnesses for IFP Litigant

A *pro se* civil litigant was prosecuting a § 1983 civil rights complaint *in forma pauperis*. The plaintiff was a prisoner and suit was filed against two guards for use of excessive force. After a bench trial, the U.S. district court entered a judgment against the prisoner. He appealed to the U.S. court of appeals for the second circuit.

On appeal the prisoner's principal argument was that the lower court judge should have secured the attendance at trial of two witnesses because he was unable to do so himself. The court refused to pay the necessary witness fees, even though the prisoner was proceeding *in forma pauperis*.

The court of appeals affirmed the judgment of the district court and held that federal courts are not authorized to waive or pay witness fees on behalf of an *in forma pauperis* litigant. In reaching this conclusion the second circuit court said: "We agree with our sister circuits [3rd, 6th, 7th, 8th, and 9th, but not the 1st, 4th, 5th, 10th, and 11th] that no reading of 28 U.S.C. § 1915 supports the contention that Congress authorized the federal courts to waive or pay [for the plaintiff's] witness fees." See: *Malik v. Lavalley*, 994 F.2nd 90 (2 Cir. 1993).

Riot Hits FCI Sheridan

On Sep. 2, 1993, a riot broke out at the overcrowded FCI in Sheridan, OR. According to a report in *The Columbian*, of Sep. 3, 1993, an office building at the four year old medium security prison was burned to the ground after 20 to 30 prisoners stormed out of the recreation area armed with baseball bats and pool cues. It took guards about two hours to regain control. The prison was subsequently locked down for officials to investigate the reason for the riot.

The prison was designed to hold 756 prisoners and holds 1,297. One guard suffered a broken wrist and two other guards and several prisoners suffered cuts and bruises. According to FCI-Sheridan spokesman Robert Palmquist, "The officers were injured while running away from rioting inmates and they were caught in the melee." "We do not think there was any attempt to do harm to staff."

The 3,500 square foot building that was destroyed was worth at least $185,000. There was also less extensive fire and water damage to the prison chapel and recreation complex.

Lucasville: A Brief History

By John Perotti

The pinnacle of the prisoners' rights movement had about reached its peak when I arrived at the Southern Ohio Correctional Facility (SOCF) in Lucasville, Ohio, in 1977. I had been transferred from the Ohio State Reformatory (OSR) in Mansfield, Ohio, to what was before the Ohio State Penitentiary, renamed the Columbus Correctional Facility (CCF) in Columbus, Ohio. The OSR was built in the late 1880's, as was CCF, had a huge wall with guard towers around it and looked like a castle. CCF looked the same but was located in downtown Columbus. Both had no hot running water or electrical outlets in the cells and were vermin infested. Both OSR and CCF were the subjects of a class action suit, see: *Stewart v. Rhodes*, 473 F.Supp. 1185 (S.D. OH 1979), appeal dismissed 661 F.2d 934 (6 Cir. 1981), consent decree entered 656 F.2d 1216 (6 Cir. 1981), and the federal court had ordered the OSP shut down, so the state got around it by changing the name to CCF. It should be noted that one of the eighth amendment violations found was using shackles and chains to four-way prisoners to bunks for days on end, a practice that is still being done at the Mansfield Correctional Institution (MANCI) located in Mansfield, Ohio.

The SOCF had a reputation for being one of the most violent prisons in the country. It was opened in 1972 to replace the Ohio pen after the riots. Upon entering J block, which housed

Continued on next page...

the hole and death row prisoners, we were all told by goon squad guards that if we ever saw J block again it better just be for fighting and nothing more because if it was they would make it awful hard on us. It was here that most of the guard on prisoner brutality and murders occur. The guards are allowed free reign to use violence on prisoners and it was a custom for them to run in a prisoner's cell and beat him, or beat a prisoner while he was handcuffed.

During this time period there was still unity amongst the prisoners. SOCF was built to house 1,600 men, one to a cell, but the cells were doubled up and the population was close to 2,300. While SOCF had an operating room and full infirmary it was understaffed and the medical treatment was atrocious with unqualified physicians being the norm. Also, stricter rules were being implemented monthly regarding mail, visiting and other areas. In 1975 or 1976 Kelly Chapman, a bank robber and jailhouse lawyer, and his cellmate Richard Jawarsky, filed a suit challenging the double celling and poor medical services. See: *Chapman v. Rhodes*, 452 US 337, 101 S.Ct. 2392 (1981). In 1978 Judge Demean issued an injunction ordering the Department of Rehabilitation and Corrections (DRC) to cut the population in Lucasville and single cell the population. A freeze was put on the population there, receiving no new prisoners until the population was cut down. The state appealed and the sixth circuit court of appeals upheld the ruling. At this time George Denton was the Director. Denton would later go to the California DOC, where he was fired for making racist comments.

There was a lot of publicity on SOCF at this time. Thirteen prisoners, called the "Lucasville 13," attempted to apply the mandate of the Helsinki Accord and renounced their U.S. citizenship and demanded to be released from prison to go to the Soviet Union. Many of these prisoners cut off their pinky fingers and mailed them to the United Nations and Department of Justice to prove their seriousness. This was also a practice of communist revolutionaries in other parts of the world (especially South Korea) to show the level of committment to their cause. The Department of Justice's response was that they could renounce their citizenship and go to the Soviet Union *after* their sentence was up. All this was in response to the overcrowding and the horrendous conditions resulting from the overcrowding. These prisoners were all in Administrative Isolation (AI) in J4 block. At this time, prisoners in AI were afforded the same personal property as population, minus TV, the same amount of commissary purchases, packages-food and such, and had a contact visiting room that was located in the rear of J block. In 1980 and 1981, changes were made in AI eliminating contact visiting and instituting plexiglass dividers and non-contact visiting. Commissary privileges were cut back, typewriters were confiscated due to the number of prisoner's civil rights cases being filed and litigated by prisoners. Affidavits were filed by the state saying that these items were safety and security hazards, as well as detrimental toward rehabilitation. Since most of the brutality occurred in J block, many brutality suits were filed from there.

In 1981 the U.S. Supreme Court reversed the holdings of *Chapman*, saying that since prisoners were allowed out of their cells daily for work and dayrooms, a minimal amount of time in the evenings was spent doublecelled and this did not constitute cruel and unusual punishment. Kelly Chapman and two others refused to work and doublecell and were placed in the hole. They began a hungerstrike and Chapman was transferred to Chillicothe then paroled to a federal detainer he had. SOCF resumed double celling and the violence started to increase.

In 1983 twelve guards beat Jimmy Haynes, a mentally disturbed prisoner, to death while nurses stood watching. The cause of death was a shattered windpipe caused by one guard jumping on his neck while another held a PR24 nightstick behind it. This was one month after a black prisoner had hit a shop supervisor on the head with a piece of steel, killing him. After the Haynes incident, a series of incidents occurred where prisoners fought back when goon squads went into their cells to beat them, resulting in much publicity and state and federal investigations. Suits were filed alleging wrongful death and excessive force. See: *Haynes v. Marshall*, 887 F.2d 700 (6th Cir. 1991); *Perotti v. Seiter*, 935 F.2d 761 (6th Cir. 1991); *Wolfel v. Holbrook*, C-1-83- (US District Court); *Dotson v. Fluke*, C-1-83 __ (SD OH) and others.

In 1983 Richard Seiter, with a career in the federal Bureau of Prisons (BOP) replaced George Denton as Director. At this same time, SOCF Warden Ron Marshall was caught by the guards union having a prisoner make zip guns for him to show Director Seiter as having been confiscated during shakedowns. The union leaked this to the media. Marshall was asked to resign but all the Ohio wardens said they would resign if he was made to do so. Seiter backed off and Marshall remained as warden.

Director Seiter brought in two "corrections experts" and started a committee of SOCF officials to study security at SOCF and make recommendations for implementing new rules, policy and procedure to institute unit management. This was first implemented in J block, Administrative Isolation was changed to Administrative Control (AC), Local Control (LC) was implemented and death row prisoners moved to K side. *All* personal property was confiscated from AC prisoners. This began a wave of resistance. Goon squads were brought in using tear gas and force to confiscate prisoners' property. J1 Super-Max, where I was housed, was underwater for over 4 months due to guards firehosing prisoners with a high pressure fire hose. Over 30 lawsuits were filed by AC and LC prisoners challenging the new restrictions. The state, via Stephen Dillon, a psychiatrist and J block unit manger, formerly from New Mexico where he worked as a psychiatrist until the Santa Fe riot, submitted an affidavit saying that the policy and procedures were tailored after *modern and common day corrections practices, as in Marion, Illinois.* He claimed that predatory prisoners were preying on weaker prisoners, would then get locked in AC where they had the same privileges as population, thus depriving them of various property gave them an incentive to go through the "levels" where they were afforded more privileges and then get out to population. We countered this by pointing out how two guards were stabbed to death in the control unit in Marion which lead to goon squads being brought in from throughout the BOP, beating the prisoners and leading to a total lockdown. We submitted affidavits from three expert witnesses who attested to the frustration and anger resulting from the beatings and lockdown. The state then

removed that paragraph from Dillon's affidavit. Letter writing campaigns were also initiated, to state representatives, civil rights groups and other authority figures, as well as organized campaigns of litigation. Tension was high and hostages were taken in the J1 Super-Max and held until the grievances were aired over the radio. Then, and only then, did the federal courts start listening, by not summarily dismissing *all* prisoners' civil rights suits. District court judge Arthur Speigel was the main one who treated prisoners' petitions fairly and focused on the social impact of the situation rather than summarily dismissing the petitions like other judges, mainly Judge Rubin, do. Prisoncrats often changed a lot of policies *before* Judge Speigel would rule on it, attempting to evade liability. It got the job done on some issues.

A branch of the Industrial Workers of the World (IWW) was organized which led to a unionization drive to declare prisoner workers "employees" entitled to minimum wages. Litigation was commenced, *Paulos, Perotti & Steward v. Serb*, Case No. ____, which was unsuccessful due to rulings labeling prisoners as being in a custodial rather than an employee position.

Dan Rather did a special on the IWW and our organizing efforts on *60 Minutes* and that generated a lot of heat on the Ohio penal system. Meanwhile, guard-on-prisoner brutality increased at SOCF. Two black prisoners, Lincoln Carter and John Ingram, were beaten by guards after touching white nurses. Both were found dead in their cells in the hole the following day. These incidents took place a month apart. We all contacted the state legislature, civil rights division and other groups calling for an investigation. The Correctional Institution Inspection Committee, along with the FBI's civil rights division and State Highway Patrol all "investigated." Lincoln Carter's murder was covered up as an overdose and while the agencies found that John Ingram was beaten, they stated the cause of death was bronchitis which occurred after the beating. No criminal charges were ever pressed against the guards, as usual.

We then prepared a 38 page Human Rights Petition detailing brutality by guards as well as related issues, with over 200 pages of exhibits asking Amnesty International to investigate for torture and violations of the United Nations Minimum Standards for the Treatment of Prisoners. We were infracted for "unauthorized group activity" and possessing "contraband" and the signatures to the petition were confiscated. This resulted in the litigation of *Wolfel, Perotti, Byrd & Scott v. Morris*, 972 F.2d 712 (6th Cir. 1992), where we won injunctive relief and the rule was declared unconstitutional as being too vague. At the same time, we had class action suits challenging all conditions in AC, *Wolfel, et al. v. Wilson, et al.*, and *Perotti, et al. v. Wilson, et al.*, C-1-89-266, which resulted in a preliminary injunction enjoining misuse of the high pressure fire hose on J1 Super-Max prisoners, and a settlement in *Wolfel* with a consent decree allowing 5 hours of recreation per week, religious magazines and a set criteria for placement in AC.

There were numerous deliberate indifference and negligence suits against medical staff which resulted in some wins. See: *Hill v. Marshall*, 962 F.2d 1209 (6th Cir. 1992), and many unpublished cases.

In 1990 the State Highway Patrol was ordered to investigate all aspects of SOCF by then Governor Celeste. This was in response to hundreds of letters written to the Correctional Institution Inspection Committee by SOCF prisoners complaining of mistreatment. Warden Terry Morris was transferred and warden Arthur Tate was placed in SOCF. Tate began instituting new rules on a daily basis, locked down most of the prison and began a wave of repression unmatched before, saying he would make the prison safe. In fact, there were more stabbings, beatings and killings after Tate began his reign of dictatorship than before. Guards were being beaten regularly for enforcing petty rules and disrespecting prisoners. All of this came to a head on Easter Sunday, 1993, when prisoners took over L Side in response to what was going to be a total lockdown to force TB tests on all prisoners. The prisoners held the prison for 11 days and 9 prisoners and 1 guard were killed. The prison remains on lockdown now as investigations are being done to prepare for indictments.

The last prisoners to leave after the riot were identified as Aryan Brotherhood, Muslims and Black Gangster Disciples. Controversy surrounds these identifications but all were taken to MANCI and have been classified as administrative control but have been held 2 per cell, contrary to both constitutional and case law. They are being denied medical care, visits were turned away, recreation curtailed, mail and food tampered with and the hundreds of other ways prisoncrats and guards retaliate against prisoners were carried out.

The prisoncrats have gotten the media to focus on the acts committed during the eleven day siege. A common tactic to distract from the reasons and conditions that caused 435 prisoners to act out of desperation over the conditions of their confinement and take control of L side, hanging banners out the windows asking the FBI to investigate the prison. All the warning signs were prevalent—prisoners utilized all means available to them *before* reaching the point of desperation. I know for a fact we all wrote civil rights groups for years, petitioned the courts for intervention, and called for the FBI and Justice Departments Civil Rights Division to intervene—all to no avail. A riot was inevitable.

The fact remains that *now* is the turning point. Changes can be made to deal with the atrocious conditions that caused this desperate act, or the situation can be criminalized and the issues detracted from as the state is trying to do, which will only create another situation where desperate men will react to the unchanged conditions. Which will it be? Will we treat the conditions leading up to the act or ignore them and risk another situation worse than the last? Remember Attica, Remember Santa Fe, Remember Lucasville!

Bullet Smuggling Guard Sentenced

Former Southern Ohio Correctional Facility (SOCF) guard Robbie Stringer, was sentenced to two years in prison and a $5,000.00 fine for smuggling seven bullets into the prison in a bag of corn chips. The sentence imposed by Judge Everett Burton was the maximum allowed by law. Stringer pleaded guilty on May 24, 1993, to one count of conveying contraband into a detention facility.

SOCF is in Lucasville, Ohio, which was the scene of a bloody riot in April, 1993, that left 10 people dead.

From The Editor

By Paul Wright

Welcome to another issue of *PLN*. The big news at this point is that Ed was recently paroled from the Washington DOC to a federal detainer and from there released by the feds. When we started *PLN* back in 1990 we agreed we would do it as long as it paid for itself and we'd reconsider the project when one or both of us got out. At the time it didn't seem like we had much to worry about in terms of either of us getting out any time soon.

We plan to continue with *PLN* and hopefully now that Ed is out we will be able to improve and expand it even more. In the meantime, while Ed gets situated and attends to minor things like finding housing and employment, I'll be handling *PLN*'s mail and such. If you write and don't get a reply right away please bear with me. Everything will otherwise continue as it has in the past. Except now Ed will be able to help with the fun tasks of folding and stapling *PLN*!

We are still working on expanding our subscriber base and are doing well in terms of new subscribers. Recently *The Echo*,a Texas prison paper, blurbed *PLN* and we received a lot of inquiries from Texas. It seems that prison papers are a good way to reach a lot of prisoners as they tend to be given to every prisoner in a given prison. I have tried to locate a penal press directory or such which would list all prison papers in the US but apparently such a publication does not exist. I would appreciate it if readers could send me the name of the editor and the publication name and address of any prison publications they are aware of. I will then contact them and ask them to blurb *PLN*. Readers are also encouraged to request a blurb for *PLN* in their local prison paper. Ideally, it should include our name, address, subscription rates and what we are about. We will send one free sample copy on request to those interested. Obviously it helps if folks include a few stamps to help defray the cost of postage. We also have a camera ready display ad available for publications willing to run it.

The best advertising is by word of mouth so if you like PLN tell your friends about us and encourage them to subscribe. Send us your friends name and address and we can send them a free sample copy. To steal the motto of Joe Bob Brigg's newsletter "We're like a drug, the first one's free." We also have bulk copies of *PLN* available for anyone interested in something to distribute or hand out at events.

I hope you enjoy this issue of *PLN*. Pass it along to others when you're done reading it.

Irish POWs Battle Extradition

By Paul Wright

For several hundred years the Irish people have battled the English occupation of their country. In more recent years the Provisional Irish Republican Army (PIRA) and Irish National Liberation Army (INLA) have continued this tradition of struggle by militarily engaging the British political-military establishment to force a withdrawal of British troops from Ireland and an end to the forced partition of the country, imposed by England after the 1922 civil war.

One of the results of this continuing struggles is that over 650 PIRA and INLA POWs now languish in prisons in the Irish Republic, occupied Northern Ireland, England and several European countries and the United States. For over twenty years Irish POWs have waged a long, bitter struggle to improve their prison conditions and gain recognition of their political status. The British government tries to deny the legitimacy of the Irish people's struggle for freedom by maintaining the fiction that there is no political struggle taking place but that PIRA/INLA attacks on British occupation forces are "criminal" acts no different than liquor store hold ups.

In 1981 Bobby Sands and other Republican prisoners held in Long Kesh prison began a hunger strike to gain recognition of their political status. The strike, which gained world-wide attention, resulted in Sands and 9 other Volunteers (as members of PIRA and INLA are called) dying due to the intransigence of the Thatcher regime. Before and since there have been numerous protests, strikes, blanket protests (the prisoners' refusal to wear prison issued clothes) and other forms of struggle concerning their treatment and conditions.

Inside the prisons in occupied Northern Ireland, especially Long Kesh, the POWs are well organized and continue their political education and activism. They even publish a quarterly magazine called *Captive Voice*. In 1983, 42 POWs liberated themselves from the infamous H Blocks at Long Kesh. Over the years some have been recaptured in the course of military actions in Ireland, others have died and others remain free.

Recently Jimmy Smyth, Kevin Barry Artt and Paul Brennan were captured in the San Francisco area and charged with passport violations by the U.S. government. All three are escaped Long Kesh prisoners from the 1983 escape. Smyth was recently sentenced to 250 days in jail for passport fraud. He has already served the term and was released on $1.5 million bail July 15, 1993, to receive medical treatment for a problem prison doctors were unable to diagnose. Smyth had been released on bail to prepare for his defense prior to this release but the government had persuaded the ninth circuit court of appeals to revoke his bail.

The government did the same thing again. On July 29, 1993, the ninth circuit court of appeals in a two to one decision, overturned the district court's bail order finding that Smyth's medical problems (he is passing blood in his urine and doctors don't know why) do not justify his release. Of course the court ignored the fact that immigrants with pending asylum claims are supposed to be imprisoned only when they present a flight risk or are a threat to the community. Conditions obviously not present with Smyth. Peter Farrelly, chairperson of the H-Block Three Committee for Justice in San Francisco said that the speed of the appeals court decision led him to believe "that a decision had already been made on political grounds at the behest of the British government." Smyth's extradition trial was due to begin on September 27, 1993.

Congressmen Elliot Engels and Joe Kennedy have asked fellow congressmen to sign a letter to attorney general Janet Reno asking that if the courts decide these men should not be

returned to Northern Ireland, that she respect that decision and not allow American justice to be dictated by the British government. We'll see how far this gets.

The British government which occupies Ireland is seeking the three men's extradition back to Northern Ireland to finish serving their prison sentences, sentences imposed by British courts (called "Diplock Courts" they have no jury, just a judge, the accused's silence can be used against them and in essence serve as kangaroo courts in the full sense of the term) to criminalise the national liberation struggle. This case brings to mind that of Joe Doherty. *PLN* readers may recall the case of Joe Doherty, a PIRA volunteer who was captured in New York City and fought off extradition to England for over eight years. Doherty repeatedly won his case for political asylum in the U.S. courts but American connivance with the British government ensured he was eventually extradited back to Northern Ireland to serve a life sentence for killing a British army officer in a gun battle.

U.S. District Judge Barbara Caulfield, in a preliminary ruling in Smyth's extradition battle, declared that Irish nationalists convicted of crimes against soldiers and police in occupied Ireland face harassment, retaliation and even death. This ruling came down after the British government refused to turn over government reports on their "shoot to kill" policy (where British troops and police kill PIRA/INLA volunteers even if they are wounded, disabled, unarmed, after they have surrendered, etc.) and collusion between British forces and loyalist death squads (just like other imperialist wars the British use death squads to kill their opponents and terrorize the civilian population).

Judge Caulfield ruled that if the British are to succeed in their attempt to extradite Smyth they will have to rebut two presumptions: that Irish nationalists accused of crimes against crown forces are "subject to systematic retaliatory harm, physical detention, or potential death," and that crown forces "either participate in or tacitly endorse these activities."

Irish POWs have won lawsuits in the European Human Rights Court against British forces for brutality and beatings at Long Kesh. The harsh and brutal treatment of Irish POWs is well documented and known to both the U.S. and British governments. This treatment constitutes the *de facto* policy of the British government to continue its occupation of Ireland by any means necessary, regardless of how brutal or vicious those means may be.

It is clear that Smyth, Brennan and Artt are entitled to political asylum in the United States because they face persecution based on their status as Irish nationalists. In the past, U.S. courts have recognized these legitimate claims to political asylum but the U.S. government has proceeded despite these claims and sent these brave men back to spend long years in the harsh prison cells of an occupying army. Their only "crime" is wanting to live in a country where they can walk down the street without being shot at by British soldiers. A few hundred years ago American colonists had that same desire. For more information on the extradition battle and news from Ireland in general contact: *An Phoblacht*, 51/55 Falls Road, Belfast, Northern Ireland.

A Bunch of Scumbags

By Adrian Lomax

A while back a friend wrote in her letter to me that, as she was writing, her son walked into the room and asked what she was doing. Upon hearing her answer, the son said, "Those guys in prison are a bunch of scumbags."

That's certainly not an uncommon belief, and the Department of Corrections does what it can to promote such thinking. Anyone who suggests to correctional administrators that perhaps prisoners should be afforded humane treatment will hear a lot about how prisoners are unscrupulous and hypocritical. A favorite rhetorical tactic of prison official is to say that prisoners are hypocrites because they're concerned about their own rights while they ignored the rights of their victims.

Prisoners vary quite a bit from one to the next, so it's difficult to generalize. In my observation, some prisoners are unscrupulous and hypocritical, others less so. Prisoners certainly have seriously flawed members among their ranks, so I can't refute prison officials' claims that prisoners are unscrupulous and hypocritical, or, in the words of my friend's son, scumbags. But are prisoners really so different in that respect than the rest of society? More specifically, are prisoners so different from those who sit in judgment over them?

James Cassidy, a lawyer and former Dane County assistant District Attorney, was recently sentenced to five years in prison. He stole $145,000 from the estates of his clients.

Former Dane County Circuit Judge William Byrne was quoted in the *Capital Times* as saying that he thought Cassidy should not be sent to prison. Byrne argued that losing his license to practice law was enough of a punishment for Cassidy.

I'd love to search through Dane County court records to determine how many people Byrne sentenced to prison, while he was a judge, for stealing property worth less than one percent of Cassidy's heist. I'm sure its a large number. Yet, because Cassidy is a wealthy white man and a professional colleague, Byrne wants to see him escape precisely the kind of justice Byrne made a career dispensing. Prisoners may be hypocrites, as the DOC says, but you'll look long and hard in Wisconsin's prisons before finding as profound a hypocrite as William Byrne.

Cassidy himself asked the judge to grant him probation. I'd like to find all the cases in which Cassidy, when he was an assistant District Attorney, demanded a prison term for someone who stole far less than he.

Worse yet, Cassidy had the chutzpah to argue that he should be spared imprisonment because of his poor health. That plea is hardly unknown to criminal defendants. I wonder how many times, as a DA, Cassidy argued that someone's ill health should not allow them to escape punishment. "This defendant committed a serious crime and harmed his victims," Cassidy is sure to have argued in those cases. Yet now he's willing to shamelessly invoke that same plea for his own benefit. Talk about unscrupulous!

And what of Rock County Judge Richard Long, who sentenced Cassidy? He's doubtless sentenced numerous poor and

Continued on next page...

non-white defendants to longer prison terms for stealing far less. And he's sworn to uphold justice.

Waupun inmate Calvin Sorenson was sentenced to nine years for three counts of shoplifting. He stole a carton of cigarettes, a pair of blue jeans and a travel iron. Joe Perkins, another Waupun prisoner, received 15 years for breaking into parking meters. Neither of those two were sentenced by Long, but their cases are hardly unrepresentative.

Who harmed their victims more - Cassidy or Sorenson? Yet Sorenson received the harsher sentence. Cassidy stole a hundred times more money than Perkins, yet he'll leave prison much sooner. Prisons are filled with minorities and the poor because the crimes of middle - and upper - class whites are weighed on a completely different scale.

This profound injustice serves specific interests, which is a subject for another column, but it's made possible only by the appalling hypocrisy of people like William Byrne, James Cassidy and Richard Long. Their unscrupulousness is made worse yet by the fact that they occupy positions of power and affect the lives of so many others.

Prisoners are, as the DOC says, unscrupulous and hypocritical. After all, James Cassidy is now a prisoner. But, as I've learned so well over the years, prisoners are not so very different at all from those on the outside. They're poorer, of course, and blacker, and younger; all of which is to say more powerless. But when you strip away the differences in race and class prisoners look an awful lot like everyone else.

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A year ago a tornado ripped through the Oregon prison farm, just south of Madison. In the aftermath, an illegal hazardous waste dump was found on prison grounds. Department of Natural Resources staff found pesticides, paint, tires, fuel oil tanks, scrap metal and other refuse at the site.

How did the DOC explain the dump's existence? Correctional officials fell back on the most beloved of all their rhetorical strategies. They blamed it on prisoners.

David Whitcomb, the DOC's chief legal counsel, told reporters that prison officials had no knowledge of the illegal dump. He said inmate workers must have been responsible.

That explanation is downright laughable. Items as large as barrels and fuel oil tanks don't turn up missing without prison staff noticing. When I worked in the Waupun library, prison staffers meticulously counted the ink pens issued to inmate workers. Furthermore, prisoners have no incentive to illegally dump toxic materials that belong to the state. It's not prisoners who are responsible to pay for proper disposal of toxic waste.

DOC officials are not only liars, they're brazen, absurd liars. As Bill Lueders wrote in *Isthmus* last March, prison administrators "lie with such regularity that [one] is reminded of the Jon Lovitz character on 'Saturday Night Live.'"

I've been held in solitary confinement since November 1992. DOC officials sentenced me to a total of three years in solitary based on their objections to my writing in this newspaper. The prison disciplinary offense they've found me guilty of on each occasion: lying. Talk about hypocrisy.

Reprinted from *The Madison Edge*

Christopher "Naeem" Trotter Needs Support Against Injustice!

Christopher "Naeem" Trotter is incarcerated at the Indiana State Prison in Michigan City. Christopher is a young man, 30 years old from a working class Black family. Chris is serving a 142 year sentence as a result of his participation in the February 1, 1985 prison rebellion at the Indiana State Reformatory. In the rebellion, 7 correctional guards were stabbed and 4 other guards taken hostage for a period of 16 hours. The rebellion was in direct response to the racist and unprovoked beating of a Black prisoner while handcuffed and shackled by white guards, during a shakedown of the Maximum Restraint Unit. These beatings had become an established pattern among the guards. Out of the more than 300 prisoners who participated in some form in the rebellion, only 6 including Chris (all Black) were hand-picked and charged on various counts. The counts included battery, attempted murder, confinement and rioting. Before the rebellion occurred, Chris had only a few more months to serve.

In April 1987, Chris was tried and convicted by an all white jury on 2 counts of attempted murder, 4 counts of confinement and 1 count of rioting. Chris was given the maximum sentence for each of these culminating in 142 years. The trial took place within the same jurisdiction as the Reformatory. The case was tried in a vacuum in which the jury was deliberately prevented from viewing all the evidence by court intervention.

Chris raised self-defense and defense of a third person (Lincoln Love, the prisoner who was severely beaten that morning). There was extensive evidence to verify this claim, crucially from one of the guards who was stabbed and from other State witnesses. In his deposition Richardson (a white guard) describes in great detail the events that led to the rebellion. Richardson spoke of a pseudo-Klu Klux Klan organization entitled the "Sons of Light" among correctional officials that systematically beat Black prisoners, and set the climate of the terror within the Reformatory. Such racism and brutality were sanctioned at the highest level; Richardson states "Then you have somebody like Captain Sands. Our children used to be baby sitted by him and played with his Klan robe. He carries a card. He's involved in it. That's the Captain which is over all the Captains of the Institution." The evidence Richardson provided regarding the beating that morning and the internal terror network were declared by the Court to be irrelevant and collateral to the charges Chris was facing. Thus, the evidence was excluded.

There are many conflicting scenarios surrounding the case of Christopher on behalf of the Indiana judicial system. We are fighting back and need your support to help assure this brother's freedom from such grotesque injustice.

Under the National People's Democratic Uhuru Movement (NPDUM) we have created a Christopher "Naeem" Trotter Defense Fund (CNTDF). We are seeking the help of people who support democracy, freedom and self-determination. We can not allow this or any injustice to continue among our people. Whether you contribution is time, participation or monetary patronage it is welcomed and appreciated. For additional information on the case or to see how you can be

involved, please contact Aziza Trotter, coordinator of the (CNTDF), POB #441761, Indianapolis, IN 46244-1761 at (317) 685-8758. You may also contact the (NPDUM) POB #368255, Chicago IL 60636, (312) 924-7072.

Send letters of support to:

Christopher "Naeem" Trotter #862556
P.O. Box 41
Michigan City, IN 46360

A Call for an Investigation of the U.S. Parole Commission

By Elton R. Winchester #31778-138, Leavenworth

The Sentencing Reform Act (SRA) that went into effect in November of 1987, abolished parole and the U.S. Parole Commission (USPC). Section 235(b)(3) of the SRA required the USPC to hear all of the old law prisoners and set them a parole date within their guidelines, leaving office in November of 1992. They were given five years to finish their work.

The USPC objected to the part in 235(b)(3) that directed them to set a date for old law offenders. The USPC convinced Congress to change that section so that they could make decisions outside the respective guidelines. This took effect in December, 1987. The five year work period remained intact.

At that point, old law offenders began asking for hearings. The USPC refused. They agreed that old law offenders had to be granted their hearings, but said that they could do so at any time within the five year period. They chose to wait for the last six months they would be in office. There are over 20,000 old law offenders in U.S. prisons. The USPC never explained how they were going to process, in six months, the enormous number of cases awaiting evaluation. Why? Because they never intended to hear the cases.

Several inmates filed court cases claiming that USPC, under the law, was required to start making immediate parole decisions. The USPC fought them back. Three separate court cases concluded in the same way, "For that limited group Congress chose not to require service of their maximum sentences but instead to afford them release on parole within their applicable parole guideline ranges." (*Lewis v. Martin*, 880 F.2d, pg 291)

At this point, old law offenders had no choice but to sit and wait for USPC to do their job. USPC said they would do it before November, 1992.

Instead of conducting the required parole hearings, USPC began holding new trials. These trials encompassed everything. In fact, the charge that had gotten you imprisoned, might not even be mentioned. They were not attempting to comply with Congress. They were blatantly attempting to justify an extension of their existence, beyond their deadline. They have decided to keep their jobs by ensuring that old law offenders remain incarcerated for as long as possible.

How did the USPC get the power to function without abiding their own guidelines? They gave themselves that power by implementing the unconstitutional Rule 2.19(c), Title 5, USC 553. It is an abuse of agency discretion and is in excess of federal jurisdiction. The use of theis rule against old law offenders violates Constitutional and Statutory rights. When a prisoner appears before USPC for a parole hearing, the USPC implements the provisions of Rule 2.19(c) to obtain de facto jurisdiction over uncharged crimes, outstanding charges, acquittals, and vacated charges of either state or federal offenses, which may or may not have nexus with the parole applicant. This allows USPC to make guilt findings against the parole applicant, imposing extended terms of incarceration as punishment.

Since the USPC's tenure was supposed to expire in November of 1992, their use of Rule 219(c) assures them extended longevity because there are thousands of prisoners still in the system subject to a two year parole review update under 18 USC 4208(h) 28 CFR 2.13 et.,seq.,2.14,et.,seq.

The use of Rule 219(c) is unconstitutional. Only Congress can bestow the authority upon an agency by making the offense a federal crime, subject to the Federal Rules of Criminal Procedure, for a guilt or innocence adjudication. That is, the Executive Branch, rather than the Legislative Branch, has enacted a "statue" bestowing itself with the authority to deem what is criminal conduct, solely by its own standard of review, and to impose punishment for said conduct, yet evading judicial review.

Thousands of old law offenders have incurred irreparable harm via the loss of their liberty because the USPC determined that the parole applicant was guilty of an uncharged offense, outstanding offense, or a vacated federal or state conviction.

In the fall of 1990, USPC was given another five year extension until November 1997. Shortly thereafter, Senator Bob Dole had his personal friend Ed Reilly appointed as chairman of USPC.

In the past, if one had served one-third of one's sentence and met the required criteria, one could expect parole. This is not true anymore. Once you enter the room where your parole hearing is supposed to take place, the USPC examiner tells you what you're to be tried for. It might be a state charge that had been dismissed or something you were never indicted for. You receive no advance notice. You're without an attorney. The USPC has never lost a case. They never found anyone innocent because the purpose of this trial is to keep recycling old law offenders solely to justify the USPC's paycheck!

This agency has run amok for several years with no one to answer to but themselves. Thousands of prisoners are being held hostage for the paychecks of the USPC. Citizens are tired of millions of their tax dollars being wasted by improvident government spending.

Hotlines for Cutting Government Waste
Commission on Civil Rights: 1-800-552-6843
Interior: 1-800-424-5081
Justice: 1-800-869-4499

Cop's Perjury Conviction Upheld

Normally *PLN* does not report on criminal cases but we thought this one might interest our readers. R.B. Springer was a Houston policeman. A Texas grand jury questioned him about numerous complaints of brutality and choking of prisoners and suspects. Springer denied any knowledge or actions of the sort. The district attorney then presented eight witnesses who testified that Springer had choked or physically abused them while they were in his custody.

Continued on next page...

Springer was charged and convicted of aggravated perjury and sentenced to ten years in prison, suspended after serving 30 days in the Harris County jail. His conviction was affirmed by state and federal courts.

It is interesting to note that Springer was only charged with lying to the grand jury. He was not charged with any of the actual beatings of the prisoners and suspects. One way to look at this is that by beating prisoners he was only committing crimes against the people which don't merit prosecution. By lying to the grand jury he was committing a crime against the government which is not to be tolerated. See: *Springer v. Coleman*, 998 F.2d 320 (5th Cir. 1993).

Prosecutorial Liability Explained

Stephen Buckley sought damages, under 42 U.S.C. § 1983, from prosecutors for fabricating evidence during the preliminary investigation of a highly publicized rape and murder case in Illinois, and form making false statements as a press conference announcing the return of an indictment against him. He claimed that when three separate lab studies failed to make a reliable connection between a bootprint at the murder site and his boots, and when the prosecutors obtained a positive identification from one Robbins, who allegedly was known for her willingness to fabricate unreliable expert testimony. Thereafter, they convened a grand jury for the sole purpose of investigating the murder, and 10 months later, the prosecutor announced the indictment at the news conference. Buckley was arrested and, unable to meet the bond, held in jail. Robbins provided the principle evidence against him at trial, but the jury was unable to reach a verdict. When Robbins died before Buckley's retrial, all charges were dropped and he was released after three years of incarceration.

In the § 1983 action, the district court held that respondents were entitled to absolute immunity for the fabricated evidence claim but not for the press conference claim. However, the court of appeals ruled that they had absolute immunity on both claims, theorizing that prosecutors are entitled to absolute immunity when out-of-court acts cause injury only to the extent a case proceeds in court, but are entitled only to qualified immunity if the constitutional wrong is complete before the case begins. The case went up to the U.S. Supreme Court, which held that prosecutors are not entitled to absolute immunity for acts committed outside of their prosecutorial duties.

The Supreme Court held that certain immunities were so well established when § 1983 was enacted that it was presumed that congress would specifically so provided had it wished to abolish them. Most public officials are entitled only to qualified immunity. However, sometimes their actions fit within a common-law tradition of absolute immunity. Whether they do is determined by the nature of the function performed, not the identity of the actor who performed it. Prosecutors, the court noted, have absolute immunity only for conduct that is intimately associated with the judicial phase of the criminal process.

Acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the state, are entitled to the protection of absolute immunity, the court held. However, in endeavoring to determine whether the bootprint had been made by Buckley, respondent prosecutors were acting not as advocates but as investigators searching for clues. Such activities were not immune from liability at common law. If performed by police officers and detectives, such actions would be entitled to only qualified immunity; the same immunity applies to prosecutors performing those actions.

In addition to the investigatorial work, the court held that the prosecutor's statements to the media were held not entitled to absolute immunity. There was no common-law immunity for prosecutor's out-of-court statements to the press, as such comments have no functional tie to the judicial process just because they are done by a prosecutor. The court also concluded that nor do policy considerations support extending absolute immunity to press statements. The court noted there is a presumption that qualified rather than absolute immunity is sufficient to protect government officials in the exercise of their duties. See: *Buckley v. Fitzsimmons*, 61 LW 4713 (June 22, 1993).

Threat States 8th Amendment Claim

Lloyd Smith is a Texas state prisoner. While working in the prison kitchen Smith witnessed a prison guard, Raymond Aldingers, order another prisoner to hold out his hand, which Aldingers then proceeded to cut open with a kitchen knife. Aldingers then turned to Smith and asked "You want some of this too?" Smith claims he was frightened and as a result had to seek psychiatric counseling. Smith filed suit under § 1983 claiming that Aldingers' actions violated his eighth amendment rights.

The district court dismissed the suit as being frivolous and revoked Smith's *in forma pauperis* status. The court of appeals for the fifth circuit vacated and remanded.

The appeals court, in a brief opinion, ruled that the district court had abused it's discretion in dismissing the suit. The legal question presented was whether the eighth amendment's ban on cruel and unusual punishment covers purely psychological injury. The court cited several supreme court and appellate court decisions holding that it does.

The court expressed no opinion as to the merits of Smith's claim or whether he had in fact pleaded a claim upon which relief could be granted. The case was remanded back to the district court for further proceedings. See: *Smith v. Aldingers*, 999 F.2d 109 (5th Cir. 1993).

Qualified Immunity for Black Box

Paul Knox is an Illinois state prisoner. After prison officials discovered four knives in his cell, Knox was infracted, found guilty and placed in segregation. Pursuant to prison policy, every time Knox left the segregation unit, to receive visitors, go to the hospital or law library, he was required to wear handcuffs, a waist chain and a black box. The black box is a hard plastic box placed over the locks of the handcuffs between the prisoner's hands. The box's purported purpose is to prevent the picking of handcuff locks.

Knox filed suit under § 1983 claiming that the black box caused him severe discomfort and physical injury, to include bleeding, indentations, numbness and continuing pain. The district court dismissed the suit holding that the defendants were entitled to qualified immunity from damages, that the eleventh amendment barred claims against the defendants in their official capacities. The court also ruled that Knox lacked standing to seek injunctive relief because he had been released from segregation and could not show a likelihood of future harm. The court of appeals for the seventh circuit affirmed.

The appeals court reviewed all published cases which challenge use of the black box. Noting that every court to consider the issue has upheld it's use, the court ruled the defendants were entitled to qualified immunity from damages in this case because no constitutional violation would have been apparent to prison officials. The court rejected Knox's attempt to distinguish this case from *Fulford v. King*, 692 F.2d 11 (5th Cir. 1982) and *Moody v. Proctor*, 986 F.2d 239 (8th Cir. 1993) on the basis that he was subjected to the black box while inside the prison while the other cases dealt with prisoners being transported outside prison walls.

The appeals court did not reach the merits in this case of whether or not the black box violates the constitution. "Although *Fulford* thus leaves open the possibility that retaliatory or punitive use of the black box may be unconstitutional, it does not create a clearly established right to be free from use of the black box inside the prison such that a reasonable prison official would understand that the conduct here would violate that right." "This is especially true where the black box is consistently used on all segregation prisoners moved outside the segregation unit and is not used arbitrarily or only at the discretion of a prison official."

The court gave an extensive discussion of the right to injunctive relief in § 1983 actions. It held Knox could not show a likelihood of future harm by the black box because the court must assume he would not violate any rules requiring segregation in the future. The court rejected Knox's argument that the prison policy was "capable of repetition yet evading review" because prison officials could release prisoners from segregation after they had filed suit, thus mooting the controversy. In a concurring opinion Judge Reynolds disagreed with this conclusion but would have reached the merits of the claim and affirmed the use of the black box on constitutional grounds. See: *Knox v. McGinnis*, 998 F.2d 1405 (7th Cir. 1993)

Letters From Readers

TB Test Info Needed

I am presently seeking information from Muslims (prisoners and civilians), who oppose taking the TB skin test on religious grounds because it violates their Islamic beliefs by having the serum injected into the skin. I am seeking affidavits, articles, legal articles (either American or Islamic law), literature and other references to the TB test being objectionable on religious grounds which are recognized by prison officials. People of other religious denominations (Christians, Jews, Rastafarians, etc.) are also encouraged to submit their input.

I have filed suit in federal court on the New York DOC's practice of requiring the TB skin test. During discovery I came across a document which allowed prisoners to take a chest X-Ray in lieu of a the skin test. I need support from brothers and sisters to show that although prison officials established the chest X-Ray alternative to deal with prisoners religious objections to the skin test, as a matter of practice they do not extend the X-Ray to religious prisoners.

In replyinge, please send your materials of support to:

Milton Musa Pacheco
C/O Neal Gonet
3545 Jamison Way, # 10
Castro Valley, CA. 94545

Corruption at McNeil Island

On October 4, 1993, they locked down all the outside shops here at McNeil Island. There has been a three month investigation into the activities of the crew bosses who headed the motor pool, plumbing shop and auto body repair shop. Last thursday the cops filmed two of these individuals with their crews loading up a huge truck which they then put on a barge to the mainland.

Once it was on the other side of the water the cops followed the truck all the way into Tacoma, where the cops saw it enter a shop owned by the auto body man. On monday morning when they saw that the crew bosses were on the morning boat to come to work here at the prison, they had the Tacoma police raid the shop. Inside they found over $200,000 of materials that had been bought with the people's hard earned tax dollars!

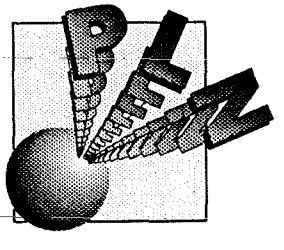
Why this story has not yet ran in the bourgeois media is anyone's guess. Maybe it's a cover up, it should be big news and yet, as of this morning, not a peep in the papers or electronic media.

R.P. McNeil Island, WA.

Family Visiting Info Wanted

Policies, analytical charts and studies and any documentary evidence on family visiting programs (also known as trailer visits, extended family visiting, etc.) and their beneficial qualities are needed in an effort to implement such a program in Ohio. Any documentation, articles, etc., that may be helpful are also needed. Send all materials to:

John Perotti
15108 Fayette Blvd.
Brookpark, OH. 44142-2465



No Right to Unmonitored Mail to Media, Clergy

A state prison regulation that requires inspection of outgoing mail directed to members of the media and the clergy does not violate inmates' first amendment rights, a majority of the U.S. court of appeals for the eighth circuit recently held. The majority noted that the mail in question would only be censored if it contained threats or escape plans.

The prisoner filed suit when Missouri officials changed the status of outgoing mail to the media and the clergy from "privileged" to "not privileged." "Privileged" mail, such as that directed to attorneys, is not read by prison officials.

The majority noted that the decisions of prison officials are upheld so long as they are "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78 (1987). Despite the prisoner's assertions otherwise, no other test applies here, the majority said.

Inmates have no right of unmonitored communication with clergy and the media, the court concluded. It noted that the defendant was free to write whatever he wanted and have his letters mailed. He could also make phone calls or even receive visits from those with whom he wished to communicate. On the other hand, prison security interests are served by the regulation, and there is no workable, less intrusive method of accomplishing those goals.

Dissenting, Judge Morris Sheppard Arnold disagreed with the majority's reliance on cases dealing with incoming mail, which he noted poses a far greater threat to prison security. See: *Smith v. Delo*, 995 F.2d 827 (8th Cir. 1993).

Prison Legal News
P.O. Box 1684
Lake Worth, FL, USA 33460

Ex Post Facto Conflict Within Ninth Circuit

In the October *PLN* we reported on the case of *Powell v. DuCharme*, 998 F.2d 710 (9th Cir. 1993) in which a panel of the ninth circuit court of appeals held that the *ex post facto* clause was not violated by the application of Washington state's new parole scheme to first degree murder cases. See, *PLN*, Vol 4, No. 9, page 4.

Three days after the *Powell* decision, a different panel of the ninth circuit reached a different conclusion. They ruled that the retroactive application of an Oregon parole regulation that lessened the amount of sentence reduction an inmate could receive violated the *ex post facto* clause. The regulation cannot be defended on the ground that the amount of the sentence reduction was purely discretionary under either version of the parole regulation, the court explained. The U.S. Supreme Court's cases in this area, such as *Miller v. Florida*, 482 U.S. 423 (1987), and *Weaver v. Graham*, 450 U.S. 24 (1981), make clear that the loss of an opportunity for sentence relief constitutes a substantial hardship, which may not be imposed on a prisoner consistently with the *ex post facto* clause. The regulation at issue, Ore. Admin. R. § 255-40-025(2), was amended after the defendant's conviction to limit to seven months the amount of sentence reduction the state parole board could grant during any one three-year period. An earlier version of the regulation permitted reductions of up to 20 percent of the prisoner's sentence, which in the present case worked out to 31.5 months. See: *Flemming v. Oregon Board of Parole*, 998 F.2d 721 (9th Cir. 1993).